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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT INC., et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In implementing a field audit program in accordance with the "prudent man" rule of ERISA, may the trustees of multiemployer employee benefit funds, without being arbitrary or capricious, request access to payroll, tax, and other "pertinent records" relating to the wages, hours and duties of *all* employees of contributing employers:

1) Where the purpose of the audit is to monitor an honor system of reporting and to assure compliance with statutory and contractual obligations;

2) Where the funds must award service credits and benefits to employees on the basis of work performed under a collective bargaining agreement even in the absence of employer contributions;

3) Where records relating to an employer's complete work force are necessary to comply with standard auditing procedures;

4) Where substantial safeguards are offered to protect the confidentiality of employee records;

5) Where the trust agreements governing the funds, as construed by the trustees, authorize such audits;

6) Where, absent such audits, the trustees must rely on the discretionary efforts of unions, employees, or the Secretary of Labor to oversee employer contributions and hence to protect the actuarial solvency of the funds.

OR

May employers withhold the records of all employees except those they *concede* are covered by the collective bargaining agreement *unless* the trustees first have reasonable cause to believe other individuals perform bargaining unit work and should be reported regardless of how the employer has classified them?

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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,[1]
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Central States, et al., respectfully petition this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered on January 20, 1983.

OPINIONS BELOW

The opinion of the district court is reported at 522 F. Supp. 658 and is set forth in Appendix A. The opinion of the court of appeals is reported at 698 F.2d 802 and is set forth in Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1983 (App. C). A Petition for Rehearing *en*

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[1] Respondents, collectively styled Central Transport, are: Central Transport, Inc., Central Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping Inc., Michiana Trucking, Inc., Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage, Bancroft Freight Lines, and McKinlay Transport, Ltd. Central States originally filed suit also against Genessee Cartage; this company was omitted from the appeal.

banc was denied on April 8, 1983 (App. D). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 141, *et seq.*, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364), are set forth in Appendix G.

STATEMENT OF THE CASE

1. Introduction

Central Transport, an interstate trucking company, like some 12,000 other employers, operates its business pursuant to collective bargaining agreements with Teamster locals. These agreements require specified weekly contributions to the Central States Health and Welfare and Pension Funds on behalf of each employee who performs bargaining unit work. The Trustees of the Central States Funds are required by ERISA to ascertain and collect all contributions owed by employers under operative collective bargaining agreements. The Trustees of the Pension Fund are also required by law to grant service credit and ultimately benefits to anyone who has performed bargaining unit work regardless of whether the employer has remitted corresponding contributions. The Trustees rely on employers to report accurately. Because many employers do not report or contribute *regularly* on behalf of some eligible employees or *at all* on behalf of others, the Trustees conduct *random* field audits to inspect employer accounts. The specific issue for review is whether, in conducting such audits, fund trustees may request and examine pertinent records relating to *all* employees in a contributing employer's work force, since it is possible for an employee to perform bargaining unit work but not be reported. The court of appeals held that they may not conduct such *general* audits. Absent reasonable cause to believe that a particular omission has occurred, the trustees are limited to the records of employees the employer concedes are "covered" by the collective bargaining agreement (A-31/32).

In its opinion, the court of appeals did not address the magnitude of the problem of misreporting to Taft-Hartley trust funds,[2] did not address the function of random general audits as a device to deter as well as to uncover delinquent contributions, did not address the need for trustee independence in this area, and departed from the standard of judicial review traditionally applied by other courts in interpreting trustee decisions under the common law of trusts which is incorporated into the "prudent man" rule of ERISA. Focusing heavily on the cost of audits and on the confidentiality of employee records, rather than on the Trustees' need to obtain verification data independently and to prevent a drain on fund assets, the court restricted the permissible scope of an audit, erected a "reasonable cause" threshold, and thus inhibited the Trustees in what they perceived to be the performance of a core fiduciary duty. In so doing, the court rejected the Trustees' contention that by limiting the records open to inspection, the *employer* would control the audit although the *Funds* would bear ultimate financial liability.

Petitioners are two of the largest trust funds in America. With assets in excess of four billion dollars, the Central States Health and Welfare and Pension Funds serve some 500,000 active workers, retirees, and their families who are dependent upon them for retirement income and health coverage and thus rely on the Trustees to determine and collect contributions, protect fund assets and otherwise assure actuarial solvency. The importance of this issue is evidenced by the fact that counsel for Petitioners have received requests to file Briefs *Amicus Curiae* in support of this Petition from more than 150 Taft-Hartley funds representing more than 8 million American workers employed in a variety of major industries throughout the United States and from a "Big Eight" accounting firm as well (App. J).

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[2] A "Taft-Hartley" trust is one established and governed in accordance with Section 302(c)(5) of the LMRA. ERISA has incorporated principles set forth in the LMRA. Important among these is equal representation of labor and management on fund Boards of Trustees, with the corresponding requirement of independent decision-making (*see NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981)).

2. The audit of Central Transport

In February, 1980, Respondents were selected for a random general audit. This was the first time the Trustees of Central States attempted to examine Central Transport's records (Appellees' Brief, p. 9; Docket entry 8), and they had no particular cause to believe Respondents were in violation of ERISA or their collective bargaining agreements. Although all 16 of the companies comprising Central Transport were admittedly engaged in the trucking industry (Appellants' Brief, p. 1), Respondents refused access to records for 60% of their work force, alleging without any substantiation that these persons were not covered by Teamster contracts, that they would never be eligible for benefits from Central States, and that their records were confidential (Aff. of R. Sigler, Director of Payrolls, A-94; Jt. App., Sixth Circuit, A-29/30, A-66/67).

Central Transport not only refused access to payroll records and other pertinent data for this group of employees; Central Transport also refused to produce any documents relevant to *concededly covered employees* if such document also contained information concerning *allegedly noncovered* employees. It thus refused to produce IRS 941 forms, although tax forms are a reliable source for the independent verification of employee earnings (Aff. of R. Sigler, *supra*, A-93/94). The auditors were asked to leave Central Transport's premises before the audit was completed (Aff. of J. Pasia; Jt. App., Sixth Circuit, A-63; A-88).

On the basis of an incomplete examination of the records only of *concededly covered employees*, the auditors determined that Central Transport engaged in four kinds of underreporting, resulting in the following alleged delinquencies: at least $172,303.50 to the Pension Fund and at least $96,059.00 to the Health and Welfare Fund (Aff. of J. O'Sullivan, Jt. App., Sixth Circuit, A-59/60; A-83/84). The court of appeals referred to these sums as "instances of underreporting" (A-17/30) and did not regard a general audit as reasonable or prudent in view of these results.

The auditors also discovered that four employees on whose behalf Central Transport was remitting contributions were not listed on the payroll pertaining to covered employees. Instead, they were listed on the office payroll (Aff. of J. Pasia, *supra*, A-87). Central Transport refused to explain why these employees were entitled to contributions when the collective bargaining agreement did not "cover" office personnel. Central Transport also refused to produce the office payroll register. Because the coverage status of these employees was unclear, the court of appeals expanded the scope of the audit to include the records of these four employees, but nevertheless asserted that general audits were arbitrary and capricious notwithstanding the fact that this kind of reporting discrepancy *illustrated* just how covered employees could be placed on an office payroll and shielded from the eyes of the auditors in accordance with Respondents' theory of confidentiality.

It is important for this Court to understand that Central States' audit of Central Transport was not "triggered" by any of the above findings, as the court of appeals concluded; these findings were the *result* of a random *limited* audit (A-17/30). Moreover, in order for the above events to be meaningful, some indication of the statutory context is necessary as are some facts concerning the internal operation of the Central States Funds and the function of audits, which facts were presented to the courts below.

3. Statutory context

In 1974, Congress enacted ERISA in an attempt to prevent the great personal tragedies that had occurred in the past when employees reached retirement age only to discover that the benefits they had worked for and expected were not available due to careless trust administration and improper funding and vesting practices.[3] Among the goals to be promoted by the new Act were: the establishment of "standards of conduct, responsibility and obligation for the fiduciaries of employee benefit plans;" adequate disclosure to participants; and adherence to minimum funding and vesting standards (29 U.S.C. § 1001).

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[3] *See Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374-375 (1980).

Under ERISA, the trustees of such plans were given "exclusive authority and discretion to manage and control the assets of the plan" (29 U.S.C. § 1103), and "trustee responsibilities" were generally conceived to be "nondelegable" (29 U.S.C. § 1105). While the details of trust administration were to be set forth in mandatory written trust instruments (29 U.S.C. § 1102), the trustees were subject to an overriding statutory obligation to act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" (29 U.S.C. § 1104(a)(1)(B)).

ERISA also requires pension funds to credit an employee with service toward the vesting of his benefits even where his employer never remitted corresponding contributions (29 U.S.C. §§ 1052(a)(3)(A)(C); 1053(b)(2)(A); 29 C.F.R. § 2530.220b-2(a)(1)(2). Eligiblity for participation is a function of hours worked not employer contributions.[4]

Pursuing the goals set forth in ERISA and carrying out the tasks imposed upon them, the Central States Trustees determined on the basis of years of experience in trust administration that random general audits of participating employers' tax and payroll records[5] are the single most reliable and effective means of uncovering delinquent contributions and identifying employees potentially eligible for

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[4] The Department of Labor requires that credit be given "*solely on the basis of service performed for a participating employer, regardless of whether that employer . . . has made or defaulted on his required contributions.*" Advisory Opinion Letter, 31 August 1976, BNA *Pension Reporter*, No. 221, Jan. 8, 1979, R-24 (A-71). (emphasis supplied)

[5] As used herein, a "random" audit means one in which an employer is selected without any reason to believe he is not reporting correctly. The employer does receive prior notice of the audit through an "engagement letter" from the Funds. The term "general" audit means that the Funds request access to pertinent records relating to the employer's complete work force, subject to safeguards to protect confidentiality. The records actually requested are, in fact, limited unless discrepancies arise. The first stage of the audit involves cross-checking of a company's payroll registers and IRS 941 quarterly earnings forms. If the total earnings figures match, the auditors can be certain that there are no missing payrolls that could relate to covered employees. Thereafter, the auditors request only those records necessary to comply with standard random-sampling techniques. (*infra*, p. 9).

service credits and plan benefits. Significantly, the DOL and the IRS have approved field audit programs. (Reg. 76-1, 41 F.R. 12740; March 26, 1976).

4. Audits and their function

A few facts regarding the operation of the Central States Funds in particular will explain why random general audits are crucial for all multiemployer funds.

An employer's obligation to contribute to Central States is established in the collective bargaining agreement, which the Trustees of the Funds have no role in negotiating. Upon contractually agreeing to participate in the Central States trusts, the employer submits a list of employees "covered" by the collective bargaining agreement and "eligible" for contributions.[6] This is known as the "base group" (A-6). Thereafter, Central States must rely on the employer to accurately report fluctuations in the base group (A-6), for example, by adding newly hired "covered" employees as well as by reporting terminations.

Because of the size of the Funds and the geographical distribution of their constituency, reporting and the remittance of contributions are based entirely on an honor system. Approximately 12,000 employers with employees in 40 states contribute to the two Funds pursuant to thousands of different collective bargaining agreements executed between themselves and Teamster Locals (A-30). Since the Central States Funds are based in Chicago, Illinois, there is no way for the Funds to physically monitor employer reporting absent a field audit program, and to verify that the reported amounts are correct.

While many employers report correctly, substantial discrepancies do occur, typically underreporting and nonreporting. An employer who "underreports" fails to contribute appropriately on behalf of employees he *concedes* are covered by the collective bargaining agreement and whom

[6] An employee is "covered" by the collective bargaining agreement if he performs work in a job classification defined in the contract (A-38); an employee becomes "eligible" for contributions when he fulfills other contractual criteria, typically, completion of the probationary period (App. E). Union membership is not a prerequisite for coverage (A-16).

he has at some time reported to the Funds, whether by including them in the base group or by subsequently adding their names on monthly reporting forms. An audit of the records of concededly covered employees can detect this kind of misreporting. Such an audit of Central Transport revealed underreporting in the alleged amount of $268,362.50 (A-83/84).

An employer who engages in the practice of "nonreporting" simply omits covered employees from the base group and never subsequently reports them to the Funds, thus eroding the actuarial solvency of both Funds and potentially increasing the unfunded vested benefits liability of the Pension Fund.[7] Audits of the records only of concededly covered employees (as mandated by the court of appeals) clearly cannot detect or remedy nonreporting.

Numbers best illustrate the magnitude of the problem of nonreporting. If only 10% of the 12,000 employers in the pool omit only one single employee from their contribution reports, the annual loss of income to the Pension Fund would be approximately $3,120,000.00 ($50.00 per week per employee x 52 weeks x 1,200 employers) (Petition for Rehearing *en banc*, p. 10).[8] Multiply even a fraction of this figure by 2,000 pension funds in the United States and the potential net loss is staggering.

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[7] Unfunded vested benefits liability is the amount by which nonforfeitable benefits exceed fund assets (29 U.S.C. § 1393(c)). This problem reached such serious magnitude that Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 and imposed withdrawal liability for up to 20 years on employers withdrawing from multiemployer funds even if these employers no longer operated under collective bargaining agreements, or ceased doing business altogether (29 U.S.C. § 1381, *et seq.*). In that the Central States Pension Fund could be liable to employees on the basis of covered service actually performed regardless of whether contributions were ever remitted, *supra*, its unfunded vested benefits liability would naturally be increased. This would have an impact on all other employers in the pool: those who withdraw would be subject to greater withdrawal liability; those who remain would probably have to agree to increased contribution rates to sustain the "defined benefits" promised to covered employees.

[8] This formula assumes a weekly contribution rate of $50.00. Many employers, including Respondents, contribute pursuant to the National Master Freight Agreement (A-16). The current contribution rate under this contract is $55.00.

Random audits of participating employers' records, then, are intended to encourage accurate reporting, to deter contractual and statutory evasions, to protect the benefit status of all eligible plan participants, and to mitigate losses of fund assets. Moreover, they are designed to intrude as little as possible on privacy rights.

In a typical audit "pertinent records" relating to allegedly noncovered employees are limited. The auditors compare payroll registers with IRS 941 forms in order to verify that they are dealing with a "complete" employee population and that there are no missing payrolls or cash disbursements. Total dollar figures rather than individual earnings are of prime importance. If the totals match, the auditors spot-check personnel files of allegedly noncovered employees. If, on the basis of this spot-check, it appears that employees listed on the payroll for noncovered employees do not in fact perform bargaining unit work, that is the end of the audit as far as this group is concerned. Even with regard to the covered employees, the audit is limited to essential records: if two documents verify the accuracy of reporting, four will not be demanded.

Substantial safeguards are also offered to protect confidentiality.[9] However, in accordance with standard auditing principles which require at least some independent verification,[10] the audit cannot be limited solely to employer-selected records of one segment of his work force, for example, the records of those employees the employer *concedes* are covered by the collective bargaining agreement. If limited only to these records, the Trustees might never discover the existence of covered employees the employer did not report in the first place, or they might discover them only at some later time when the employer was already out of business or bankrupt, thus precluding a recoupment action as suggested by the court of appeals (A-34).

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[9] The safeguards offered by Central States will be discussed below in connection with the legitimacy of Respondents' confidentiality claims (*infra* p. 25-26). The safeguards enunciated in *Central States, Southeast and Southwest Areas Pension Fund* v. *Theut Products* (No. 82-71080 E.D. Mich. 1982), are standard. (Petition for Rehearing *en banc*; App I).

[10] *See*, for example, SEC Accounting Release No. AS-19; CCH Fed. Sec. Laws Repts. § 72,020; *see* also the American Institute of Certified Public Accountants' Statement on Auditing Standards regarding "Sufficiency of Evidential Matter" (1980) and 29 U.S.C. 1023(A-59-62).

5. Proceedings below

The district court, carefully analyzing the language of various provisions of the Trust Agreements which afford the Trustees both specific powers and broad managerial discretion, found that the Trustees had a contractual right to audit records relating to the employer's entire work force, and that this right would be enforced unless Central Transport could show an overriding interest in confidentiality (A-10). In light of the safeguards offered by Central States and the relevance of the records for the purposes requested, the court found that on balance the Trustees' need for information outweighed the employer's interest in confidentiality (A-11/12). The court then determined that ERISA supported the Trustees' request for records and that the audit demanded was neither arbitrary nor capricious (A-12/13). Central Transport was ordered to produce the records requested, and the court refused to certify its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Although the district court's opinion was rendered in the context of cross-motions for summary judgment, Central Transport filed an appeal under 28 U.S.C. § 1292(a)(1). The district court had assumed jurisdiction under 29 U.S.C. § 185(a) and 29 U.S.C. § 1132.

The court of appeals took jurisdiction and reversed,[11] finding neither a statutory nor a contractual basis for random general audits. While the court acknowledged that "the trustees must ensure that contributions to the Funds correlate with the disbursement of benefits from them" (A-29), and that "entitlement to Funds' benefits . . . may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee," citing *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981), it nevertheless restricted audits to the records of concededly covered employees and to the records of *particular individuals* as to whom the Trustees had *reasonable cause* to believe they were covered regardless of how they were classified by the employer or the Union. The court did not explain how such "reasonable cause" could be generated.

[11] The decision was unanimous and the opinion relatively lengthy. However, very few authorities were cited to support the court's rulings.

Misapprehanding the purpose of the audit, as noted above, the court reasoned that on the basis of apparent "instances of underreporting for covered employees" (more than a quarter of a million dollars!) and "the receipt of monies for four employees whose coverage was not disclosed by the Union seniority list, Transport, or the Union", it would be "arbitrary and capricious" to audit "the records of all of Transport's employees" (A-30); indeed, the court stated that no "prudent man" would authorize such an audit, if only because of the "expenses" involved (A-30). In so concluding, the court appeared to elevate the cost factor above all other components of a "prudent" trustee decision (29 U.S.C. § 1104) and did so without any evidence of the cost of this particular audit or of audits in general.[12]

The court accepted as a fact that the majority of Central Transport's employees were not covered by collective bargaining agreements. However, there is no evidence in the record that this "fact" had been established or agreed to by Petitioners. (A-30)[13] Nevertheless, the court objected to the Funds' audit on confidentiality grounds without addressing the safeguards offered (A-31).

Finally, the court noted, without citing *any* authority, that the Funds would be adequately protected through the efforts either of the Union and the Secretary of Labor or of employees themselves, although the former would likewise be subject to a reasonable cause barrier while the latter might not know either of their eligibility for benefits or that their employer was not reporting, *infra*.

Although the court of appeals devoted much of its attention to the Trust Agreements governing the Central States Funds and, in its opinion, substituted its interpretation for that of the Trustees, the primary issue for review is

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[12] There is absolutely no evidence in the record as to the cost of the audit either to Central Transport or, more importantly, to the Funds. This is very significant, since the panel found that random general audits would be contrary to ERISA because of their cost; the suggestion is that such audits would be a waste of Fund assets and, for this reason, arbitrary and capricious (A-30).

[13] Allegations such as these are precisely what audits are supposed to verify! Petitioners *never* conceded the truth of this allegation. *See* Appellees' Brief, pp. 26-27.

whether the Trustees have an independent statutory right under ERISA to conduct random general audits, circumscribed by safeguards to protect confidentiality, in order to *independently* monitor reporting, to verify coverage, and to deter evasions. Or, are such audits *per se* arbitrary and capricious because they are too expensive and too intrusive, in which case *any* trust instrument purporting to authorize this procedure would be unenforceable as contrary to *ERISA* and public policy. In other words, amendment of the Central States Trust Agreements would not resolve the problem.

REASONS FOR GRANTING THIS PETITION

The court of appeals' decision should be reviewed because it is inconsistent with national pension policy and the goals of ERISA; it conflicts with the rationales of relevant decisions of this Court and of various circuits; it has departed from the correct standard of judicial review of trustee action; and it has failed to recognize the magnitude of misreporting to the Funds and thereby accorded too much weight to the confidentiality of employee records.

1. A dilution of trustee independence is contrary to the LMRA and ERISA and is inconsistent with decisions of this Court and those of various circuits.

One of the most potentially harmful aspects of the court of appeals' decision is that it dilutes the trustee independence mandated by the LMRA and ERISA. Having found that Petitioners had neither an independent statutory right to conduct random general audits nor a contractual right to do so under their Trust Agreements, the panel made a speculative assertion that the Funds' interests would be adequately protected through the efforts of Unions, employees or the Secretary of Labor (A-33). The Trustees' position is now untenable; they must not only rely on employers to report accurately and, if audited, to produce all the necessary data; they must also rely on third persons, whose activities they cannot control and whose knowledge may be limited, to monitor the honor system of reporting and protect the actuarial solvency of the Funds. This reasoning conflicts with a number of decisions of this Court and those of various circuits.

In *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562, 571-572 (1982), this Court confirmed that in enacting 302(c)(5) of the LMRA, Congress intended benefit funds to be completely independent of Union control. Reliance on the Union to protect the actuarial solvency of the Funds is inimical to Congressional intent.

ERISA did not alter this mandate of independence. Indeed, 29 U.S.C. § 1105 makes "trustee responsibilities" nondelegable. Interpreting various provisions of ERISA, including its fiduciary obligation rule, this Court imposed a strict neutrality requirement on fund trustees. *NLRB* v. *Amax Coal Co., supra*, 332-334. It thereby laid to rest the lingering belief that trustees are part of the collective bargaining process or can have dual loyalties, both to the groups appointing them and to trust beneficiaries. Reliance on the intervention of third persons whom the Trustees can not control and who may have competing interests is not only inimical to ERISA's nondelegability rule but contrary to the principles enunciated in *Amax*.

The court of appeals placed particular reliance on Union efforts in monitoring the honor system of reporting and protecting the interests of all eligible participants. Such reliance is inconsistent with decisions of this Court and of the Third, Eighth, and Fifth Circuits.

In *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 398 (1981), the Third Circuit stated that fund trustees, not Unions, have a fiduciary duty to "oversee" employer contributions: "While the union does owe a duty of fair representation to its members (citations omitted), it does not control, nor is it in a position to oversee, the employer's contributions to the fund" (p. 599, fn. 10). Drawing upon the teaching of the Eighth Circuit in *Phillips* v. *Kennedy*, 542 F.2d 52 (8th Cir. 1976), the court stated further:

> If a trustee's fiduciary duty requires anything in the administration of the trust, it requires him to inform the pensioners of their employer's failure to make the required contributions to the fund. Continued eligibility is

> the core of the trustee beneficiary relationship and those responsible for the administration of the fund are required to notify pensioners when their employer jeopardizes their eligibility. (p. 600)

Trustees cannot notify covered employees of their eligibility or otherwise inform them of their statutory or contractual rights unless and until they first ascertain who these persons are. To the extent an employer engages in nonreporting, random general audits allow the trustees to fulfill this core fiduciary obligation.

Even if Unions were in a position to "oversee" employer reporting, the duty of fair representation to the bargaining unit as a whole might prompt them not to press claims for fringe benefits if this jeopardized base wages or jobs.

It is well established that agreements having a discriminatory effect may be legitimate for economic reasons and hence consistent with the duty of fair representation. *See Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) and *United Mine Workers* v. *Robinson, supra*. Indeed, recognizing that such decisions are legitimate, the Third Circuit stressed why Union domination of a trust fund would result in precisely the kind of conflict of interest that Section 302(c)(5) of the LMRA was designed to prevent by requiring independent neutral administration of Taft-Hartley funds. *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977).

Consistent with this reasoning are also *Robbins* v. *Prosser's Moving and Storage Co.* and *Robbins* v. *Schneider Moving Co.*, 700 F.2d 433 (8th Cir. 1983)[14] as well as *Bugher* v. *Consolidated X-Ray Service*, 705 F.2d 1426 (5th Cir. 1983). Here, both the Eighth Circuit *en banc* and the Fifth Circuit determined that fund trustees were not required to exhaust the grievance mechanism of a collective bargaining agreement but could proceed directly to a court to collect delinquent contributions even where resolution of the dispute might involve interpretation of the governing labor contract. Underlying this position is the fact that fund

[14] Petitions for Writs of Certiorari were filed on May 17, 1983; No. 82-1860 and 82-1862.

trustees cannot compel Unions to arbitrate; thus, they should not be required to rely on their aid. As this Court made clear in *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981), *collective* bargaining with its spirit of compromise and the duty of fair representation under the LMRA are not necessarily consistent with the protection of *individual* rights, particularly *individual statutory rights*. Respondents did not address any of these cases; nor did the court of appeals.

The Sixth Circuit's opinion is not only inconsistent with the above line of cases; it is also belied by the *actual facts* before it in *Central Transport*: if the Union could monitor reporting and protect employee interests so effectively and so reliably, how can one explain that alleged delinquencies in excess of $268,000.00 were discovered on the basis of an incomplete audit by Central States?

The court also believed that employees could pursue their own benefit rights, suggesting that they might be estopped from claiming them if they did not (A-34). This is contrary to express policy declared in ERISA as is evidenced by the fact that a number of provisions of the statute as well as corresponding DOL regulations require trustees to provide participants with comprehensive information about their statutory and contractual rights. (29 U.S.C. §§ 1022, 1024, 1025; 29 C.F.R. § 2520.104b-1).

While constructive knowledge of existing laws is a frequently cited legal maxim, ERISA is a particularly complex statute. Indeed, in *Nachman Corp.* v. *PBGC*, *supra* at 361, this Court used the word "reticulated" to describe it. If specialist lawyers are often required to interpret this "reticulated" law, it is fundamentally unfair to expect workers who may have limited educations and in some cases may not even speak English to weave their way through its provisions. Moreover, employees may not even know they *are* participants, particularly if they perform covered and noncovered work. Or, they may be compromised into accepting paychecks without fringe benefits upon the promise of a regular job. There is no authority to suggest that this kind of compromise is tantamount to a voluntary waiver of a statutory right justifying an estoppel, particularly if economic conditions are uncertain.

The employee could, of course, go to the Union for help, provided he were aware of a problem.[15] For the reasons described above, however, the Union might or might not act. It is well established that an employee who seeks to obtain judicial review of a Union's failure to prosecute a grievance must shoulder a heavy burden. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Although this Court may have increased the Union's sensitivity to employee grievances as a result of *Bowen* v. *U.S. Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), a burden still exists and is substantial. In any event, Congress declared that it is the *trustees'* duty to protect employees' benefit rights.

Finally, the court of appeals suggests that the Secretary of Labor can aid the funds. Neither the legislative history of ERISA nor the text of the statute supports the idea that the Secretary's investigative activity comprehends random general audits similar to those performed routinely by the Administrator of the Wage and Hour Division of the Department of Labor under the Fair Labor Standards Act (29 U.S.C. § 211). Thus, ERISA does not authorize the Secretary *to enter* an employer's premises and inspect books and records unless he has reasonable cause to believe a violation of the statute has occurred (29 U.S.C. § 1134). Even with reasonable cause, the Secretary's investigative activity is discretionary. Given the large number of employers contributing to employee benefit plans and the manpower available to the DOL, history and logic suggest that the Secretary's intervention will be reserved for unusual situations. In fact, it appears that the major focus of DOL investigative activity has been and will continue to be plans themselves and their trustees. CCH Pension Plan Guide ¶ 25, 496 (May 19, 1983). As the Eighth Circuit observed in *Robbins* v. *Prosser*, *supra*:

> Defendants suggest that the trustees, in addition to asking the union to invoke arbitration, could also seek

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[15] Even employees whose coverage is conceded cannot know without further inquiry whether their employer is contributing correctly since contribution information does not appear on a paycheck stub. If an employee was never reported in the first place, he would never get a Summary Plan Description from the Funds, and would be even less likely to know of his rights. Such an employee would either have to know the law itself or be able to rely on the Union.

> administrative or criminal remedies, but these avenues are even more remote and uncertain than the second-hand access to arbitration that is put forward as the funds' main recourse.[16] (p. 442)

Significantly, in enacting the MEPPAA, Congress *withdrew* from the Secretary his power to institute a collection action (29 U.S.C. § 1132(b)(2), 1145).

Collecting delinquent contributions, managing fund assets, and providing adequate disclosure to plan participants are core fiduciary obligations of trustees under ERISA. Random general audits are indispensable tools for performing these obligations. The court of appeals has impeded the ability of the Trustees to shoulder their obligations fully and independently. In light of the practical effect of the decision as well as its departure not only from relevant statutes but decisions of this Court and those of various circuits, this Petition should be granted.

2. Under the correct standard of judicial review, random general audits are not arbitrary and capricious under ERISA.

a. The court of appeals limited the Trustees' right to conduct audits under the authority of ERISA by incorrectly applying the proper standard of judicial review to the "prudent man" rule: the decision not only interferes with a routine matter of trust administration but may limit the scope of discovery under the Federal Rules of Civil Procedure.

Both pre-ERISA and post-ERISA law is well established that reviewing courts may not substitute their own judgment for that of benefit fund trustees or interfere with their decisions unless these decisions are "arbitrary and capricious." *Danti* v. *Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Rehmar* v. *Smith*, 555 F.2d 1362 (9th Cir. 1976). For trustees' conduct to qualify as "arbitrary and capricious," however, the act or decision must lack substantial justification, have no basis in fact, be erroneous as a matter of law,

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[16] There is only *one* reported instance of a conviction of a private corporation and its principals for misreporting to a fund. *U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir. 1983). Interestingly, part of the evidence on which the conviction was based derived from a random general audit of the employer's payroll and tax records by the Central States Pension Fund.

be inconsistent, or be made in bad faith. These qualifications are legion in circuit decisions throughout the nation.[17]

Although definitions of what is "arbitrary and capricious" have emerged almost exclusively in the area of benefit claims where courts have scrutinized trustees' interpretations of plan documents, there is no authority to suggest that acts or decisions undertaken by trustees pursuant to the "prudent man" rule of ERISA (29 U.S.C. § 1104(a)(1)(B)) should be subject to more stringent review, so long as the trustees are acting *solely* in the interests of participants and beneficiaries. In fact, limited judicial review is consistent with the common law basis of the "prudent man" rule, as will be discussed below.

The court of appeals, however, did substitute its judgment for that of the Trustees. Without showing that random general audits were arbitrary and capricious as qualified by a majority of other courts, it created a *particularized* "reasonable cause" standard for the production of documents based on its own narrow view of relevance.[18] The decision will therefore affect not only consensual audits but also pretrial discovery.

Clearly, trustees may henceforth be required to file collection actions at the first sign of an actual delinquency and avail themselves of discovery techniques to obtain all the data they believe is necessary to verify the accuracy of reporting. This would impose heavy costs on funds and increased caseloads on courts. Even worse, courts may henceforth find that trustees are not entitled to documents through discovery that they would not be entitled to on the merits in light of *Central Transport*.[19] Should this prove to

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[17] By way of example, *see Marsh* v. *Greyhound Lines, Inc.*, 488 F.2d 278 (5th Cir. 1974); *Maness* v. *Williams*, 513 F.2d 1264 (8th Cir. 1975); *Adams* v. *N.J. Brewery Employees Pension Trust Fund, et al.*, 670 F.2d 387 (3d Cir. 1982); *Wardle* v. *Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980) as well as *Danti* v. *Lewis*, *supra*, and *Rehmar* v. *Smith*, *supra*.

[18] Thus, substantial underreporting for concededly covered employees would not be sufficient cause to warrant the production of pertinent records for the rest of the work force; the trustees would still have to show on a case by case basis why additional records are relevant. This enhances the potential for multiple litigation.

[19] This is not a hypothetical question but one facing the district court in *Central States* v. *Theut Products*, *supra* (App. I).

be true, the effect of the Sixth Circuit's ruling will have been to create a new and unprecedented privilege for employee records not found in the Federal Rules of Evidence.

b. Random general audits are not "arbitrary and capricious" under the "prudent man" rule of ERISA.

The district court, citing a number of provisions of ERISA, found that the Trustees had a statutory right to "pursue a complete audit of the defendant Central Transport's payroll records and employment data in order to verify whether employment status has accurately been reported and benefit contributions properly made" (A-13). The court of appeals reversed, reasoning that "the statutory provisions of ERISA do not, in themselves, impose" such a duty upon the Trustees (A-19). Absent a specific *duty*, the court was unable to find a specific statutory predicate for the *right* to conduct a "complete" audit.

It is not surprising that the court of appeals failed to find an express provision in ERISA authorizing "complete" audits. Having recognized that employee benefit funds differ from each other in so many respects, the drafters of ERISA refrained from setting forth a comprehensive list of specific acts which trustees were required to perform in order to fulfill their statutory fiduciary obligations and effectively administer the assets committed to their care. Rather, ERISA contains a number of affirmative duties[20] and a few specific prohibitions (29 U.S.C. § 1106), and leaves the details of trust administration to be articulated in written trust agreements, specific to each fund.

Nevertheless, 29 U.S.C. § 1104 is a core provision of ERISA and sets forth both the fiduciary obligation and prudent man rules of the statute, which provide the measure by which Trustee activities must be gauged where an act is neither expressly commanded nor expressly prohibited.

In formulating this overriding provision, however, Congress purposefully painted with a broad brush. This is

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[20] For example, the duty to file annual reports (29 U.S.C. §§ 1023 and 1024); to furnish participants with Summary Plan Descriptions (29 U.S.C. §§ 1022, 1024, and 1025); to diversify investments (29 U.S.C. § 1104(a)(1)(C)); the duty to retain records (29 U.S.C. 1027, 1059).

because ERISA was specifically intended to codify principles applicable to the common law of trusts (A-13),[21] which would permit a maximum of flexibility and discretion and yet afford such well-established curbs on trustee conduct as good faith, reasonableness, and consistency. Audits or accountings are not only traditional and routine trustee activities,[22] but also specific to particular purposes and circumstances and therefore unsuitable for *explicit* detailed formulation in ERISA. That does not mean that the statute does not *implicitly* encompass "complete" audits. While the *power* to conduct audits of some kind may be implied from 29 U.S.C. § 1103, which gives the Trustees exclusive authority to manage and control fund assets, the *permissible scope* of the audit is precisely the kind of issue to be resolved by the "prudent man" rule of 29 U.S.C. § 1104.

Petitioners have already stated why random general audits are prudent: to deter evasions; to verify that all persons actually performing covered work are being reported; to protect the benefit status of every person entitled to coverage and disclosure under ERISA; to foster actuarial solvency; to prevent potential increases in unfunded vested benefits liability; to comply with standard auditing practices; to assure that Trustees maintain an *independent* role in the administration of the trusts. These reasons do not require further comment here. It need only be said that since these reasons are based on law *and* fact, they cannot, by definition, be arbitrary and capricious.

Random general audits by fund trustees are analogous, if not functionally equivalent, to the random inspection of records conducted by the Administrator of the Wage and Hour Division of the DOL pursuant to Section 11 of the FLSA (29 U.S.C. § 211), an Act whose remedial purposes

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[21] *See* 3 *U.S. Code and Administrative News*, 1974, p. 4651; *NLRB* v. *Amax Coal Co., supra*, pp. 332-33; *Robbins* v. *Prosser., supra*, p. 439 *et* seq.

[22] *See* Bogert, *Trusts and Trustees*, Chap. 46, *Accounting and Compensation* (2d ed. 1975). In the context of employee benefit trusts, the trustees' right to audit contributing employers' records was rarely challenged prior to 1980. (*See* Appellees' Brief, pp. 22-26). Central Transport itself conceded that there was a *single* case on point: *Central States, et al.* v. *CRST*, 641 F.2d 616 (8th Cir. 1981). *CRST* was substantially overruled by *Robbins* v. *Prosser, supra*.

and actual remedies closely parallel those of ERISA. Courts construing the inspection powers of the Administrator have rejected most of the arguments raised by Central Transport and accepted by the Sixth Circuit.

In *Fleming* v. *Montgomery Ward Co.*, 114 F.2d 384 (7th Cir. 1940), *cert. denied*, 61 S. Ct. 71 (1940), the Seventh Circuit rejected the reasonable cause standard. Analyzing the purpose of the FLSA, the court articulated a general rule that is equally applicable to the case at bar: namely, where a duty to regulate exists, facts essential to an intelligent performance of that duty cannot be withheld else the "shadow" rather than the "substance" of authority is conferred: "to limit the Secretary's right 'to inspect books to cases in which he has already obtained information justifying a formal complaint against somebody defeats the purpose of the Act'" (p. 389). This Court ultimately rejected a reasonable or probable cause standard for authorized FLSA investigations and subpoenas in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201 (1946).

Turning to the permissible scope of a subpoena duces tecum (available to the Administrator if an employer does not voluntarily produce the records requested), the Seventh Circuit in *Montgomery Ward* also drew a number of conclusions relevant to trustee audits under ERISA.[23] Most important for the purposes of this Petition, the court rejected the employer's argument that the subpoena was unreasonable because the records requested "would include records of employees not entitled to the benefits of the Act":

> *Petitioner is not required to accept respondent's classification of employees*; and, in fact, the necessary conclusions seem to be that petitioner, in making the investigation "to determine whether any person has violated any provision of (the) Act, or which may aid in the enforcement of the provisions of (the) Act" must determine for himself, in the first instance, whether an employee of an employer subject to the Act is one entitled to the Act's benefits and whether he has received those benefits. It would be *impossible for the*

[23] For example, the Administrator could request records that were not detailed in the statute. He could also request records from the employer without first showing that they were unavailable from other sources such as from employees themselves.

> *Administrator to discharge his duties under the Act without full information* respecting the wages and hours of employees and the nature of their duties, *regardless of whether particular employees are exempt from the provisions of the Act*. (p. 392, emphasis supplied)

Nor should the Trustees, by analogy, be required to accept Central Transport's classifications and be satisfied with the records only of concededly covered employees.

Montgomery Ward was followed by the Eighth Circuit in *Cudahy Packing Co.* v. *Fleming*, 122 F.2d 1005 (8th Cir. 1941). Prior to litigation, the company had refused to produce any records unless the Wage and Hour Division first advised it of the "names of any employees concerning whom complaint had been made." A subpoena then issued which authorized the Administrator to inspect two of the employer's plants. The employer objected that one of these plants was engaged solely in intrastate commerce and hence not subject to the Act. The employer therefore challenged the subpoena. Relying on *U.S.* v. *Darby*, 312 U.S. 100, 125 (1941), in which the Supreme Court stated that "the requirement for records even of the intrastate transaction is an appropriate means to a legitimate end," the court permitted inspection at both plants: "Where an industry is subject to the Fair Labor Standards Act, the Administrator is entitled . . . to inspect the records of all of its employees, both non-exempt and exempt" (p. 1009).[24] By analogy, Petitioners should be able to inspect the records of concededly "covered" as well as allegedly "noncovered" employees.

Petitioners recognize, of course, that a distinction exists between a governmental agency and a private Board of Trustees. However, in contrast to the FLSA, Congress left the task of conducting routine audits primarily to fund trustees while assigning the DOL the responsibility of ensuring that the trustees perform their fiduciary duties (*supra*, p. 16). Thus, these trustees should not be denied access to information that is necessary for them to perform their duties "intelligently" and prudently, particularly since Con-

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[24] This decision was reversed by this Court, but only on the grounds that the Administrator's subpoena power under the Act had been invalidly delegated. 315 U.S. 785 (1942).

gress declared that employee benefit plans "are affected with a national public interest" (29 U.S.C. § 1001(a)).

The "continued well being and security of millions of employees and their dependents" and the "protection of interstate commerce" are interests that are surely as important as the interests Congress sought to protect in passing the FLSA. Random general audits promote these interests and should be allowed provided that trustees can adequately protect the employer's interest in confidentiality. Petitioners can and have done so. However, the Sixth Circuit did not even address the safeguards offered.

3. The Trustees' need for information outweighs the employer's interest in confidentiality: a review of this defense to disclosure is as necessary in the context of ERISA as it was in the context of the NLRA.

While a balancing of competing interests has led to the emergence of well-defined rules for the disclosure of confidential information to Unions in order to enable them to effectively perform their role as bargaining representatives, this technique has not yet led to equivalent disclosure standards where benefit fund trustees request information under the authority of ERISA in order to effectively perform their role as prudent fiduciaries. Nevertheless, the district court accepted, as an appropriate analogy, the relevance standards enunciated by this Court and the courts of various circuits in 8(a)(5) refusal to bargain cases, and found that on balance the Trustees' interest in verifying information on employment status through random general audits outweighed the employer's interest in protecting the confidentiality of records, given the safeguards offered by the Central States Funds to protect that interest (A-11/12).

The court of appeals accepted the NLRB disclosure rules analogy only with reluctance, and then found that Petitioners did not satisfy the relevance test or protect the interests of Central Transport or its noncovered employees. Misconstruing the purpose of the audit as a strategy "triggered" by reporting inaccuracies, the court found that "concern over the status of four employees" did not "justify an investigation into the records of all Transport's employees" (A-32). As observed above, the court inexplic-

ably failed to recognize that these findings were the *result* of the audit not its precipitating cause. Moreover, it did not even *once* address the safeguards *offered* to protect the interests of Central Transport and its employees, let alone decide whether such safeguards were sufficient and should be considered as part of a balancing test.

Most important for the purposes of this Petition, the court of appeals appeared to merge relevance and reasonable cause. Although the Trustees demonstrated why records relating to an entire work force were relevant for the limited purpose of their on-site audits, the court determined that only the records of concededly covered employees were relevant unless the Trustees had reasonable cause to believe that particular employees in the allegedly "noncovered" group were engaged in bargaining unit work, in which case the employer would be required to disclose records relating to these persons. A particularized reasonable cause standard is inconsistent with the liberal "discovery-type standard of disclosure" approved by this Court in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).[25]

Relevance for disclosure purposes is, of course, a threshold determination. In articulating the particularized reasonable cause standard, however, the Sixth Circuit not only put the cart before the horse by linking disclosure to the merits; it also failed to give sufficient weight to the balancing process undertaken by this Court in *NLRB* v. *Detroit Edison*, 440 U.S. 301 (1979).

In *NLRB* v. *Detroit Edison, supra*, this Court balanced the Union's need for information against the interests of an employer and its employees in the confidentiality of aptitude tests and test scores. The Union had requested this information in order to process grievances on behalf of six employees who were allegedly denied employment on the basis of their test results. Because leakage of these highly sensitive materials could destroy their usefulness and embarrass employees, the employer refused to produce them directly to the Union in the form requested. However, the

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[25] It is also inconsistent with *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), in which this Court rejected an employer's blanket refusal to substantiate its claim that it was financially unable to meet a Union's demand for higher wages.

employer offered a number of viable alternatives which would have permitted the Union to process the grievances adequately; it also offered to produce the test results of any employee who consented to their production. The NLRB ordered direct production to the Union of all requested information, the Sixth Circuit affirmed, and this Court reversed, stressing the particular nature of the materials requested, the viability of the alternatives offered, and the minimal burden on the Union of obtaining the consent of the six employees who were the subjects of the grievance and whose actual tests scores were relevant. Most importantly, the Court observed that the employer had not "fabricated the concern for employee confidentiality only to frustrate the union in the discharge of its responsibilities."

Detroit Edison suggests that the greater the sensitivity of the information requested, the greater is the interest in confidentiality. Nevertheless, the Court did not give its approval to a naked assertion of confidentiality. If information is relevant, it must be produced in some useful form. Moreover, consent to the release of allegedly confidential information, even of a highly sensitive nature, is not a *per se* requirement for its disclosure. Rather, consent would appear to depend on the burden of obtaining it and on whether an express promise not to disclose was made.

In the case at bar, the court of appeals accepted Central Transport's naked allegation of confidentiality with regard to a majority of its employees, although no alternatives were offered to permit independent verification of the accuracy of reporting, although the burden on the Trustees of obtaining consent from these employees would have been onerous, if not impossible, although the materials requested were not of the same degree of sensitivity as aptitude tests and test scores, and although more than a quarter of a million dollars of alleged delinquencies were determined for the concededly covered group before the auditors were asked to leave the premises.

The Trustees have offered substantial safeguards to protect confidentiality: no addresses need be produced; individual salary figures for corporate officers may be deleted as long as total earnings are available; individual records of

noncovered employees may not be copied or removed from the employer's premises once the auditors determine that they do not, in fact, perform bargaining unit work; no information concerning noncovered employees may be transmitted to any third persons, including the Union, without the employer's consent; all sensitive materials such as test scores and personal information may be removed from those personnel files of noncovered employees randomly selected. (App. I).

These safeguards can be monitored by the employer; they can also be enforced through protective orders. Moreover, if this information is "leaked" to promote Union-organizing efforts or the competitive interests of rival employers (specters which Central Transport raised without a shred of evidence to show that the Trustees have *ever* transmitted audit results for such purposes), this would be a breach of the strict neutrality rule enunciated by this Court in *NLRB* v. *Amax Coal Co.*, *supra*, for which remedies are available. More to the point: fund trustees have a practical stake in promoting confidentiality so as to assure the continued cooperation of employers in monitoring an honor system from which employers themselves stand to benefit.

Before now, this Court has enhanced the Union's ability to perform its statutory duty by fashioning standards of relevance and articulating disclosure rules in the context of collective bargaining; it has done so by balancing competing interests. Petitioners now request this Court to undo the *de facto* privilege created by the court of appeals, and enhance the ability of fund trustees to perform their fiduciary obligations through a similar process of balancing.

4. The Trust Agreements governing the Central States Funds provide a contractual basis for random general audits.

The primary purpose of this appeal is to vindicate an independent statutory right. On the other hand, the two Trust Agreements governing the Central States Funds are not ordinary contracts. Rather, they function as the blueprint for centralized trust administration and affect relationships between the Trustees and thousands of employers in many jurisdictions. Because of this and because the language of these Agreements typifies that found in instru-

ments governing multiemployer funds in general, the Sixth Circuit's substitution of its interpretation for that of the Trustees is likely to affect the integrity of other trust agreements and hence trust administration throughout the United States. Review of the basis upon which the court rejected the Trustees' contractual claim is therefore warranted, particularly since amendment of the Trust Agreements would not resolve the court's objections.

In conducting random general audits, Petitioners have consistently relied on Article III, Section 5, *sentence 2* of the Trust Agreements. This provision states:

> The Trustees may, by their representatives, examine the *pertinent records* of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust" (A-46, emphasis supplied).

Exercising their power to construe the terms of the Trust Agreements, and to make these constructions binding on employers, employees, and the Union (Article IV, Section 17, A-48), the Trustees have consistently and at all stages of this litigation urged that the term "pertinent records" does not mean a limited class of "employee records"[26] but means what a plain English rendering says it means in the context used: records necessary to complete the audit in accordance with recognized procedures which prefer or require independent verification of employer assertions.[27] At a minimum, this construction could *reasonably* include records beyond those of employees the *employer* concedes are covered.

The district court upheld the Trustees' construction; the court of appeals reversed, finding that the term "pertinent records" was synonymous with the term "employee re-

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[26] Article I, Section 3(a) of the Trust Agreements defines the term "employee" as one covered by the collective bargaining agreement and eligible for contributions under the contract or applicable law (A-43). Article III, Section 5, sentence 2 *expressly does not* limit the production of records for audit purposes to those of "employees," no less to those of "concededly covered employees:" it specifies "pertinent records."

[27] *See* fn. 10, *supra*. A typical "assertion" is "completeness" of records.

cords."[28] In reaching this conclusion, the court first of all substituted the term "employee records" for the term "pertinent records," in effect *rewriting an express* provision of the Trust Agreements. It also rejected the Trustees' reasonable construction of the term "employee," which encompasses not only the "concededly covered" group but also the "*de facto* covered" group which the court itself agreed could sustain a claim for benefits, *regardless of concession*, in a court or through arbitration (A-29).[29]

In rejecting the Trustees' contractual claim, the panel departed from the limited standard of judicial review set forth above in connection with ERISA. The decision is therefore in direct conflict with *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), in which the Court of Appeals for the Second Circuit asserted that where a trust

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[28] Focusing on the definition of "employee" in Article I, Section 3(a), the court reasoned that if the term "employee" is construed to include "noncovered" as well as "covered" employees, then the Trustees would not merely be entitled to examine the records of "noncovered" employees but would also have to extend rights and benefits under the trusts to "noncovered" employees which would be contrary to the intent of the parties to the Trust Agreements as well as to the collective bargaining agreements. It would also be contrary to ERISA, which requires fund trustees to exercise their fiduciary obligations solely to participants and beneficiaries (A-19; 24-25).

[29] As Central States argued in their Petition for Rehearing *en banc* (pp. 7-9), the Trustees *have never asserted* that the term "employee" as used in the Trust Agreements means "covered and noncovered employee" (A-24/25). They cannot, by law, extend "coverage" under the labor agreement, "rights" under the Trust Agreements, or "benefits" in the Funds to "noncovered employees." What the Trustees *do claim* is that they have a nondelegable duty under 29 U.S.C. §§ 1104 and 1105 to look beyond lists and records of "*concededly* covered employees" in order to verify that an employer is accounting for *all covered employees* in his work force (conceded and *de facto*), particularly since it is the Funds which bear ultimate financial liability to any employee who can sustain a claim for benefits on the basis of covered employment actually performed *regardless* of whether contributions were ever or can ever be received on his behalf. In this regard, Petitioners point out the obvious: while non-participants and non-beneficiaries *are* admittedly outside the scope of the Trustees' fiduciary duty, undetected "covered" employees are not non-participants. Properly construed, the Trust Agreements are clearly *consistent* with ERISA. *See* 29 U.S.C. § 1104(a)(1)(D). It may be recalled that 29 U.S.C. § 1002(7) defines "participant" as an "employee" who is or "may become" eligible for benefits.

agreement affords trustees broad powers of construction, "the judicial role is limited to determining whether the trustees' interpretation was made rationally and in good faith, not whether it was right."

The Sixth Circuit's narrow construction of the language of the Trust Agreements was based on that set forth in *Central States* v. *CRST, supra*. As noted above, the Eighth Circuit substantially overruled this decision. Significantly, the *CRST* panel never actually rejected as meritless Central States' contention that it could not *independently* verify the accuracy of reporting without access to more complete records. However, the court stated that *it* could not "re-write" the contract; the implication is that the *Trustees* could do so.

Pursuant to Article X of the Trust Agreements, the Trustees could amend Article III, Section 5, sentence 2 to require the production of "pertinent records" for "all persons employed by the employer." The records could also be specified in detail. Such amendment might nevertheless be an exercise in futility, since the Sixth Circuit's ruling *transcends* any language in the Trust Agreements. However precisely the production request might be worded, random audits of an employer's complete work force would still involve objectionable "expenses" and would still impermissibly "intrude" on the records of persons who did not "bargain" for the instrusion (A-30).[30]

In sum, unless this Court finds that random general audits of an employer's complete work force are "prudent" under ERISA, taking into account the relevance of the information requested and the safeguards offered to protect confidentiality, employee benefit trust funds will be ill-equipped to prevent nonreporting.

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[30] Although noncovered employees cannot, by definition, "bargain" through the representative of the "covered employees," they are still part of the "public" ERISA was designed to protect.

CONCLUSION

The court of appeals' decision has placed the trustees of multiemployer employee benefit funds in an untenable position: they must shoulder their fiduciary responsibilities independently but are urged to rely on the discretionary activity of Unions and the Secretary of Labor who may be moved by competing interests of their own and over whom the trustees have no control; they must exercise these fiduciary obligations solely on behalf of participants and beneficiaries but are urged to rely on the very people whose interests they are supposed to protect; they must disclose information to plan participants whose identity they cannot necessarily ascertain; they must protect the actuarial solvency of the funds but cannot fully oversee employer contributions; they must grant credits and benefits to employees on the basis of covered employment but cannot fully verify coverage in advance of claims made; they must conserve fund assets but are faced with the possibility of conducting multiple law suits in order to pursue a routine matter of trust administration.

For all of the reasons set forth herein, Petitioners respectfully request this Court to issue a Writ of Certiorari; to give content to the prudent man and fiduciary duty rules of ERISA; to articulate a uniform standard for the judicial review of trustee action; to establish an appropriate standard of relevance and hence appropriate disclosure rules for the production of documents to trustees; and to reconfirm the principles of nondelegability and trustee independence.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT INC., et. al.,
Respondents.

APPENDIX

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Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND.

Plaintiffs,

-vs-

Civil No. 80-71872

CENTRAL TRANSPORT, INC., et al.

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, are employee benefit plans designed and maintained to serve as repositories of benefit fund contributions from companies with employees engaged in interstate trucking. The plaintiff funds will be referred to here as "Central States." Relying upon the jurisdictional grants of Section 301(a) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. 185(a)), and Section 502 of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA") (29 U.S.C. 1132), Central States filed the instant complaint on behalf of its trustees, participants, and beneficiaries against 16 named defendants. The defendants, all companies engaged in interstate transportation of goods, will be referred to collectively as "Central Transport."

The gravamen of plaintiff's complaint is that Central Transport has failed to accurately report and remit benefit fund contributions for all employees covered by the collec-

tive bargaining agreements which establish the benefit plans. Central States has asked this court to issue an order permitting its auditors to conduct an independent verification of Central Transport's complete payroll records in order to determine whether the duties and status of each of its employees has been accurately reported by Central Transport. Without such an independent audit, Central States argues that it is unable to insure the financial integrity of the benefit funds and to fulfill its fiduciary obligations to the participants in and beneficiaries of the benefit plans.

On August 25, 1980, Central Transport filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Central Transport contends that Central States has neither a statutory nor a contractual right to the payroll data of all of its employees, without prior determination by the local union and the employer that particular individuals are covered by the collective bargaining agreement and thereby eligible as plan participants. Central Transport also argues that its obligation to protect the confidentiality of employee records prevents disclosure of data for those individuals who are not covered by the collective bargaining agreement.

Central States replied to the defendant's motion to dismiss, and at the same time filed its own motion for partial summary judgment, or in the alternative for a preliminary injunction to permit an audit of the defendant's payroll and employment records. The matter was set for hearing before the court. The parties then agreed on the record that the relevant facts are not in dispute and requested that the court treat their respective pleadings as cross-motions for summary judgment.

Having considered the oral and written arguments of the parties, partial summary judgment in favor of the plaintiff Central States is hereby granted. As is further discussed

below, this court finds that the plaintiff Central States has both a contractual right and a statutory obligation under the circumstances to independently verify the status and duties of all individuals employed by Central Transport in order to insure that proper benefit contribution payments are being made. The court therefore orders that Central Transport provide to the audit representatives of Central States all of the documentation requested and that the audit procedure undertaken by Central States be allowed to continue.

Each of the defendant companies are parties signatory to a collective bargaining agreement entitled the "National Master Freight Agreement" and to certain supplementary agreements with various local union affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The National Master Freight Agreement undisputedly obliges an employer to make weekly health and welfare, and pension contributions to a fund jointly administered by the union and the employer for each employee "covered by the agreement." (National Master Freight Agreement, April 1, 1979 to March 31, 1982, Article 60 and Article 61). Article 60 and Article 61[1] of the National Master Freight Agreement specify the amount of weekly health and welfare and pension benefits to be paid for each covered employee. These provisions further authorize the Central Transport employers to enter trust agreements which set forth the terms and conditions under which the benefit funds are to be administered. Significantly under Article 60 and Article 61, Central Transport agreed to ratify all action taken or to be taken by the benefit plan trustees within the scope of their authority. Thus Article 60 states:

> By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties

[1]Article 60 of the National Master Freight Agreement applies to "Health and Welfare Benefits" and Article 61 applies to the "Pension Plan." The language from each article which is significant to this court and which is quoted in its opinion is identical.

> hereto to enter into appropriate trust agreements necessary for the administration of such Fund, *and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by Trustees within the scope of their authority*. (Emphasis added).

In addition to the National Master Freight Agreement and to the Trust Agreements, Central Transport has undisputedly executed participation agreements applicable to the plaintiff Pension Funds and joint applications applicable to the plaintiff Health and Welfare Funds, which also confirm the defendant's obligation to be bound by all actions of the trustees in administering the Central States funds. Paragraph one of the Pension Fund participation agreement reads as follows:[2]

> *The Union and the Employer herein agree to be bound by*, and hereby assent to, all of the terms of the Trust Agreement creating said CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, all of the rules and regulations heretofore and hereafter adopted by the Trustees of said Trust Fund pursuant to the said Trust Agreement, and *all of the actions of the Trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted*. (Emphasis added)

Clearly, the unambiguous language of the collective bargaining agreement, the joint application and the participation agreement executed by every Central Transport employer, binds Central Transport to the terms of the Trust Agreement and to the actions of the Trustees in administering the benefit funds.

---

[2]A provision similarly binding the union and Central Transport to the Trust Agreement and to all the actions of the Trustees in administering the Health and Welfare fund is contained in paragraph one of the joint application as well.

The Trust Agreement[3] itself delineates Central Transport's obligation to plan participants and beneficiaries and sets out the precise scope of the Trustees' power to administer the benefit funds. The court finds that the clear language of the Trust Agreement accords Central States in its capacity as Trustee the right to conduct an audit of all payroll data for those individuals whom Central Transport employs, regardless of whether the defendant considers them to be covered by the collective bargaining agreement.

Article II of the Trust Agreement establishes the Central States' funds, and creates a Board of Trustees consisting of equal numbers of employer and union representatives. (Trust Agreement Article II, Sections 1 and Section 2). Each employer is obligated to make "continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement . . ." (Trust Agreement Article III, Section 1). Collection of employer contributions and enforcement of payment obligations is delegated to the Trustees. (Article III, Section 4).

Article III, Section 5 of the Trust agreement requires both the employer and the union to furnish employment records and personal background information of "employees" to the Trustees upon request. In pertinent part, Article III, Section 5 states:

> Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the name and current addresses of its Employees, their Social Security numbers, the hours worked by each employee (and past industry employment history in its files)[4] *and such other infor-*

---

[3]The Revised and Amended Trust Agreement for Central States, Southeast and Southwest Areas Pension Fund and the Revised and Amended Trust Agreement for Central States, Southeast and Southwest Areas Health and Welfare Fund will be referred to collectively as the "Trust Agreement." Unless noted differently the provisions cited and the language quoted by the court are identical in each agreement.

[4]This provision is not contained in Article III, Section 5 of the Health and Welfare Fund Trust agreement.

> *mation as the Trustees may reasonably require in connection with the administration of the Trust. The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust . . .* (Article III, Section 5). (Emphasis added)

Traditionally, the Central States Funds have operated on a self-reporting basis, which required the employer to initially establish a base group of employees entitled to weekly contributions and then to inform the plaintiff monthly of any fluctuations in the employment status of individuals covered by the collective bargaining agreement. Central States relies upon the status reports of defendant employers to compute an invoice statement which it forwards to Central Transport. Thus, when the employer reports the termination or layoff of an individual formerly covered by the collective bargaining agreement, Central States will adjust its records and reduce the defendant's invoice to reflect the reported change. Conversely, when an employer reports the addition of new employees, Central States will increase the invoice by an amount which corresponds to the weekly contribution figure multiplied by the number of weekly hired employees.

On December 5, 1979, Central States mailed the following letter to Central Transport:

> Public Law, 93-406, commonly called ERISA requires us as the Fiduciary to make periodic reviews of participating employer contributions for the benefit of Plan Participants and their Beneficiaries.
>
> We would like to make this review at your offices beginning the week of November 26, 1979, with a representative of Local Union No. 124.

This review will encompass the following:

1. Determination of eligible Plan Participants covered by Collective Bargaining Agreements.

2. Verification of member history contributions.

3. Reconciliation of any account balance differences.

The records required will be the documents which support the recording of time worked and payroll computation and recording for all collective bargaining unit employees.

Our findings will be discussed with you at the completion of the review and confirmed in a written report.

During the course of the audit, Central Transport provided some payroll records for those employees whom it had determined were covered by the collective bargaining agreement. (See affidavit of Robert E. Sigler, individually and as Director of Payroll of each defendant company.) However, based upon the contention that approximately 60% of its employees were not covered by the collective bargaining agreement and therefore not eligible for benefit contribution, Central Transport refused to provide tax forms and complete payroll ledgers as requested by the Central States' auditors. The audit was terminated before completion on March 28, 1980, after the audit staff was asked to leave the Central Transport premises. Nevertheless, affidavits of two auditors engaged in the examination of Central Transport's record attest to the fact that reporting discrepancies and contribution deficiencies were discovered. (The affidavit of Juanito P. Pasia notes the discovery of reporting discrepancies relative to four specifically named individuals. In his affidavit, Manager of Central States' Field Employer Audit Department, John P. O'Sullivan, states that based upon preliminary and incomplete audit findings he believes the defendants are collectively indebted to Central States for at least $172,303.50.)

Central Transport relies upon a narrow interpretation of the term "Employee" as used in the Trust Agreement to reject Central States' demand for full payroll data and records of all individuals employed by Central Transport. Specifically, Central Transport points out that Article I, Section 3 of the Trust Agreement defines an employee as "a person who is employed under the terms and conditions of the collective bargaining agreement . . . and on whose behalf payments are required by such collective bargaining agreement." Central Transport alleges that 60% of its employees are not employed under the terms and conditions of the collective bargaining agreement and that the Trustees therefore have no obligation or right to inspect the employment data of these individuals.

The court finds that the Trust Agreement defines the term "Employee" far more broadly than Central Transport would concede, and that the defendant is therefore obliged to turn over complete payroll data for all individuals as demanded by Central States pursuant to Article III, Section 5 of the Trust Agreement. In the first place the definition of employee contained in Article I is not intended to be exclusive. Rather Article I, Section 3 states that the term "Employee" shall include any one of five alternative definitions; it does not limit the definition in any further way. Moreover, Article I, Section 3(e) is particularly broad in that it states:

> In all instances, the common law test, or the applicable statutory definition, of master-servant relationship shall control employee status.

It is apparent to the court that all individuals on an employer's payroll, whether covered by a collective bargaining agreement or not, qualify under the common law test of employee status. Consequently, the unambiguous language of the Trust Agreement itself accords Central States the right to examine the employment and payroll data of all individuals on the Central Transport payroll

under Article III, Section 5. The court further finds that the independent audit which the plaintiffs are pursuing falls squarely within the language of Article III, Section 5, which permits demand of "such other information as the Trustees may reasonable [sic] require," including examination of the "pertinent records of each Employer" as is "deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust."

In addition to the language of Article III, Section 5, the Trust Agreement contains a number of other provisions which empower the Trustees to undertake an independent audit of the payroll records of all Central Transport employees. Thus Article III, Section 4 states:

> The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint . . . shall have the power to demand and collect the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund . . . (Article III, Section 4.)

Article IV, Section 9 of the Trust Agreement authorizes the Trustees to formulate and promulgate any and all rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust. This provision also states that all such rules and regulations are binding upon the parties to the Trust Agreement, the Union and Central Transport.

Article IV, Section 14(e) empowers the Trustees, "to do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder." Each of these Trust Agreement provisions are broad enough to reasonably ac-

comodate the plaintiff's demand that Central Transport submit to a complete audit of its payroll records and data.

The precise scope of the trustee's power is to be found in the trust agreement, and the courts are traditionally unwilling to interfere with a trustee's decision regarding benefit fund administration *Rehmar* v. *Smith*, 555 F2d 1362 (9th Cir. 1977); *Marsh* v *Greyhound Lines*, 488 F2d 278 (5th Cir. 1974). Consequently, in the absence of fraud, action by a trustee taken pursuant to the powers accorded in the trust agreement will not be overturned unless the court finds it to be arbitrary and capricious. *Rehmar* v. *Smith, supra; Danti* v. *Lewis*, 312 F2d 345 (D.C. Cir. 1962); *Taylor* v. *Bakery and Confectionary Union and Industry International Welfare Fund*, 455 F.Supp 816 (E.D.N.C. 1978).

The plaintiff, Central States, argues that an audit is necessary in order to insure the financial integrity of the benefit funds. As Central States has pointed out, the funds are liable to participants and beneficiaries whether a particular employer makes the proper contribution or not. See ERISA, Sections 202 (a)(1)(A)(ii) and 203 (a)(2), [29 U.S.C. 1052(a)(1)(A)(ii), 29 U.S.C. 1053 (a)(2)], 29 CFR 56462, December 28, 1976, Section 2530.200b-2(a). In light of the broad grants of discretion contained in the Trust Agreement the court finds that the decision of the Central States Trustees to conduct a complete audit in order to verify Central Transport's reporting accuracy and payment compliance is not arbitrary and capricious. Accordingly, the data which Central States demands must be produced by contractual obligation, unless Central Transport is correct that the overriding considerations of confidentiality prohibit the disclosure of non-unit employee data.

In order to assess Central Transport's claims of confidentiality the court has examined the line of cases which consider an employer's obligation to disclose information to union representatives during the collective bargaining pro-

cess. Beginning with *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), the courts have recognized the general obligation of an employer to provide the union with the information it needs to properly perform as a bargaining representative. Particularly when the requested information concerns non-unit employees the courts have examined the question of whether the information being sought is relevant to a legitimate union need. *N.L.R.B.* v. *Rockwell-Standard Corp.*, 410 F2d 953, 957 (6th Cir. 1969). *Curtiss-Wright* v. *N.L.R.B.*, 347 F2d 61 (3rd Cir. 1965). The general approach has been to apply a liberal discovery standard to the issue of relevancy in order to evaluate each case on its facts. See *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *Brazos Electric Power*, 101 LRRM 1003 (NLRB, 1979), enf'd 615 F2d 1100 (5th Cir. 1980).

Central Transport has failed to show that the information which Central States demands is not relevant to the independent audit being proposed. The court has already noted that the Trustees may reasonably require the payroll data information under the express terms of the Trust Agreement and the collective bargaining agreements between Central Transport and the union. Drawing upon the analogy to the collective bargaining process cases involving unions and employers, the court notes that if the union itself is entitled to relevant payroll information of non-unit employees, the plaintiff Trustees are similarly entitled to such disclosures. Those cases which Central Transport cites to support its confidentiality argument, concerning the disclosure of testing data, are not applicable to the payroll information which Central States seeks. In arriving at its conclusions, the court is mindful of the fact that Central States has repeatedly stated that confidential payroll data will not be copied or removed from the Central Transport premises once the auditors have satisfied theselves that particular individuals are not performing unit work. Bearing the plaintiff's assurances in mind, the court finds that the defendant's interest in protecting the confidentiality of its

non-unit employee records does not outweigh the Trustees' right to access to this information.

Not only does the plaintiff have a contractual right to the information it demands, but a number of statutory provisions within ERISA also mandate that Central States be allowed to pursue a complete audit in order to fulfill its non-delegable duty as a fiduciary under Section 405 (29 U.S.C. 1105). By enacting ERISA, Congress recognized the increasing economic impact which employee benefit plans have upon the well-being and security of millions of employees and their dependents. 29 U.S.C. 1001(a). Consequently, it is the declared policy of the Act to protect the interest of participants in employee benefit plans, *inter alia*, by requiring the disclosure and reporting to participants and beneficiaries of financial information and by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans. 29 U.S.C. 1001(b).

Specifically, ERISA imposes upon a fiduciary the obligation to discharge its duties with the care, skill, prudence and diligence of a prudent man. Thus Section 404, (29 U.S.C. 1004 [sic]) states:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (a) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries . . . with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

There is no question but that trustees are fiduciaries within the meaning of the Act. 29 U.S.C. 1002(14).

ERISA legislative history indicates that the Congressional drafters refrained from delineating a precise list of powers and duties to be undertaken by fiduciaries, but

rather intended that fiduciaries be governed by the principles applicable to the common law of trusts. Introducing the conference report, Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare commmented:

> . . . [T]he legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust. 3 United States Code and Administrative News, 1974, p. 5186.

The court has already noted that under the common law a trustee's decision in administering a benefit fund will not be disturbed unless it is arbitrary and capricious. Given the fiduciary nature of the trustee's duties to preserve and maintain the assets entrusted to it, the court finds that ERISA mandates that Central States be allowed to pursue a complete audit of the defendant Central Transport's payroll records and employment data in order to verify whether employment status has accurately been reported and benefit contributions properly made.

Finally, Central Transport argues that the plaintiff has no right to examine the records of non-unit employees because the collective bargaining agreement contemplates arbitration of coverage questions. Central Transport posits that until an individual is determined to be a member of the bargaining unit, he is not eligible for fund benefits or participation. As only the union and the employer can settle questions of unit membership under the grievance procedure provision, Central Transport believes the plaintiff is precluded from inspecting the records on non-unit

employees. The court rejects this argument for three reasons. In the first place, the Trust Agreement and accompanying collective bargaining agreements between the union and the employer all contemplate and ratify the Trustee's broad discretion to undertake all acts which Central States deems necessary and proper for the administration of the benefit funds. Secondly, since neither Central States nor its Trustees are parties to the collective bargaining agreements between the union and Central Transport, the contract grievance provisions are not applicable and can provide no recourse to plaintiffs herein. *See United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Third, the court does not agree with Central Transport's contention that the audit verification procedure amounts to a dispute over unit membership. If and when such a dispute arises, nothing in this opinion prevents the arbitration of a union membership question between the union and the employer. However, this contractual grievance procedure cannot substitute for the Trustees' right and obligation to conduct an independent audit in order to insure the financial integrity of the benefit funds charged to their administration.

Consequently, defendant's motion for summary judgment is denied and plaintiff's motion for partial summary judgment is granted consistent with this memorandum opinion and order.

IT IS SO ORDERED.

(s) ANNA DIGGS TAYLOR,
United States District Judge

Dated: OCT 19 1981

APPENDIX B

No. 81-1757

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

and

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Plaintiffs-Appellees,

v.

CENTRAL TRANSPORT, INC., et al.,

Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 20, 1983

Before: LIVELY and KENNEDY, Circuit Judges; and WILHOIT,* District Judge.

KENNEDY, Circuit Judge. Central Transport, Inc., et al. (Transport)[1] appeals from an order of the District Court

---

* Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

[1] Appellants are 16 corporate entities either directly engaged in the transportation of goods in interstate commerce or otherwise supportive of such transportation. They are collectively styled "Transport" since all are represented by the same counsel and collectively raise identical issues.

holding that Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund (the Funds) have a statutory and contractual right to inspect the records of *all* of Transport's employees to determine whether they are entitled to be participants in the Funds so that Transport is responsible for making contributions to the Funds on their behalf.

The Funds were created by trust agreements between multi-employer associations to which Transport belongs and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and its various locals (the Union). Transport has assented to and agreed to be bound by the trust agreements creating the respective Funds. The Funds are employee benefit plans subject to the Employee Retirement Income Security Program Act (ERISA), 29 U.S.C. §§ 1001-1461.

Transport is a signatory to the National Master Freight Agreement and/or supplemental, individual agreements to which the Union is a party. The collective bargaining agreements require that Transport make payments to the Funds on behalf of employees covered by the collective bargaining agreements. An employee is covered by the collective bargaining agreements if engaged in a job classification described in the National Master Freight Agreement and/or supplements. Union membership is not a prerequisite to coverage so that both union and non-union employees are covered if their job classification is so described. These employees are eligible for pension, health and welfare benefits from the Funds.

A substantial percentage of Transport's employees are not covered by the collective bargaining agreements. Transport is not required to make contributions to the Funds with respect to these individuals. Instead, Transport makes contributions to a company benefit pension plan which is also an ERISA plan. The present controversy relates only to an audit sought by the Funds.

In January 1980, the trustees of the Funds authorized and commenced an audit of Transport to verify the accuracy of Transport's reporting of covered employees. Concern over the accuracy of Transport's reporting was triggered by the Funds' receipt of contributions for four employees of Transport who were on the office payroll as well as instances of apparent underreporting for covered employees. In response, the Funds sought quarterly reports, insurance exception listings and other information which included many documents relating to non-covered employees outside of the scope of the collective bargaining agreements as well as those covered employees within its scope. When Transport refused to disclose information about Transport employees without a prior determination by Transport and the Union that they were actually covered by the collective bargaining agreements, the Funds terminated the audit.

The Funds instituted this action seeking a preliminary injunction to require Transport to provide the Funds with the names, current addresses and social security numbers of *all* of its employees, *i.e.* covered and non-covered, along with the hours worked and verification documents. The Funds argued it had a statutory and contractual right to inspect the records of *all* of of Transport's employees. The statutory right is allegedly derived from ERISA, 29 U.S.C. §§ 1102-1105, which delineates trustee responsibilities and powers, and 29 U.S.C. § 1059 which imposes a duty of responsibility and record keeping on employers with respect to all employees who are participants in an employee benefit plan. The contractual right is allegedly derived from Article III, section 5 of the trust agreements, which provides for the production of records and Article IV of the trust agreements which sets forth the trustees' powers and duties. The Funds also asserted a common law right to all records under general fiduciary principles. Transport contested these assertions on the grounds that the audit of all employee records was outside of the statutory provisions of ERISA and the

contractual agreements of the parties as embodied in the collective bargaining agreements and the trust agreements. Transport raised the confidentiality of non-covered employee records as a further defense.

These legal issues were presented to the District Court in the form of cross-motions for summary judgment. The District Court granted the Funds' motion for summary judgment on the grounds that covered and non-covered employees of Transport were within the definition of "employee" contained in the trust agreements and that the audit was authorized by ERISA and the contractual agreements between the parties. This decision allowed the Funds complete access to the records of all of Transport's employees. Transport appealed and the District Court granted a stay of its order pending appeal.

To the extent the District Court considered the audit of the records of all of Central's employees to be sanctioned by statute, the question is one of law and is freely reviewable. *Nash* v. *Farmers New World Life Insurance Co.*, 570 F.2d 558 (6th Cir.), *cert. denied*, 439 U.S. 822 (1978). The constructions of the collective bargaining agreements and the trust agreements also raise issues of law and are freely reviewable. *See Industrial Equipment Co.* v. *Emerson Electric Co.*, 544 F.2d 276, 283 (6th Cir. 1977). The propriety of the trustees' decision to order an audit, however, once a determination has been made that such an audit is authorized under the parties' agreements as a matter of law, is limited to a determination of whether the trustees' decision is arbitrary, capricious or in bad faith. *Van Gunten* v. *Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586 (6th Cir. 1982).

I. Statutory Right

The Funds allege that they have a statutory right to audit the records of all of Transport's employees under ERISA, 29 U.S.C. §§ 1102-1105. It is a declared policy of ERISA to protect the interests of participants in employee benefit plans by requiring the disclosure and reporting to participants and

beneficiaries of financial information and by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans. *Id.* § 1001(b). ERISA imposes special responsibilities on the trustees who administer employee benefit plans and the employers, such as Transport, who contribute to them. Trustees have the discretion and authority to manage and control trust assets. *Id.* §§ 1102-1103. They are held to the high standards of fiduciaries, *id.* § 1104, and are governed by principles applicable to the common law of trusts. [1974] U.S. Code Cong. & Ad. News 5083.

A trustee's duties as a fiduciary, however broad, are nevertheless limited in two significant respects. Under 29 U.S.C. § 1104(a)(1), a fiduciary must "discharge his duties with respect to a plan *solely in the interest of the participants and beneficiaries* . . . ." (emphasis added). Non-participants and non-beneficiaries are outside the scope of this statutorily imposed duty. In addition, 29 U.S.C. § 1104(a)(1)(D) imposes the further restriction that a fiduciary discharge his duties "*in accordance with the documents and instruments governing the plan* insofar as such documents and instruments are consistent with the provisions of . . . [ERISA]."[2] (emphasis added) The documents and instruments governing the plan include the collective bargaining agreements entered into between Transport and the Union and the trust agreements.

The statutory provisions of ERISA do not, in themselves, impose upon trustees the duty to audit records of all of Transport's employees to independently verify whether any given employee is covered by the collective bargaining agreements. Instead, the provisions of ERISA require reference to the terms of the collective bargaining agreements and the trust agreements to determine who are the participants and

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[2] The documents and instruments covering the plan, however, must not be inconsistent with other ERISA provisions, *i.e.*, they cannot excuse a trustee's breach of his fiduciary duties, permit a trustee to engage in a transaction prohibited by 29 U.S.C. § 1106, or contain exculpatory clauses.

beneficiaries to whom statutorily imposed duties are owed and to the terms of the trust agreements to determine what the precise nature of those duties are. Therefore, the District Court erred as a matter of law in finding the audit to be statutorily authorized.

II. Contractual Duties

The Funds argue that Article III, section 5 of the trust agreements, gives it a contractual right to audit the records of all of Transport's employees. This provision states:

> **Production of Records** – Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and *such other information as the Trustees may reasonably require in connection with the administration of the Trust.* The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business *whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.* (emphasis added)

Contrary to the Funds' assertions and the District Court's holding, the term "employee," as used in the foregoing provision of the trust agreements, is not all-inclusive and does not comprehend *all* employees of Transport.[3] First, the collective bargaining agreements between Transport and the Union representing covered employees authorize payment to the Funds as part of the benefit package for covered employees. The agreements require Transport, as an employer, to make weekly contributions to the Funds for each employee

[3] ERISA, 29 U.S.C. § 1002(6), however, defines "employee" as any individual employed by an employer.

covered by the agreements who has been on the payroll thirty days of more. Non-covered employees are outside of the scope of the collective bargaining agreements and Transport is not obligated to make contributions on their behalf.

Second, non-covered employees of Transport are outside the definitions of "employee" contained in Article I, section 3 of the trust agreements. Article I, section 3, provides that the term "employee" as used therein shall include:

(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; or

(b) All persons employed by the Union, upon being proposed by the Union and after acceptance by the Trustees; and as to such Union personnel the Union shall be considered as Employer, solely for the purposes of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits; or

(c) All persons employed by the Central States, Southeast and Southwest Areas Health and Welfare Fund or by the Central States, Southeast and Southwest Areas Pension Fund upon acceptance by the Trustees; and as to such Trust personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits;

(d) All persons who are Trustees of Central States, Southeast and Southwest Area Health and Welfare Fund or Central States Southeast and Southwest Areas Pension Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances, the common law test, or the applicable statutory definition, of master-servant relationship shall control employee status;

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

The definition of employee in Article I, section 3(a) is written in the conjunctive. A person is an employee under the trust agreements if he or she is employed under the terms and conditions of a collective bargaining agreement *and* is a person, *i.e.*, a covered employee, on whose behalf payments are required by the collective bargaining agreement. A non-covered employee of Transport is neither employed under such terms and conditions nor entitled to have payments made into the Funds on his or her behalf. Non-covered employees of Transport are similarly outside the scope of Article I, section 3(b), all persons employed by the Union, and section 3(c), all persons employed by the Funds, because they are employed by neither. Nor are they trustees under section 3(d).

The use of the phrase "shall include" in Article I, section 3 does not expand the meaning of "employee" to encompass non-covered employees. In the Eighth Circuit case of *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981), which is factually on point with this case, the court addressed this issue as follows:

> We are aware that the term "shall *include*" is not necessarily synonymous with the term "shall *mean*." It is frequently used as a term of enlargement. In our judgment, it was so used as to those persons described in subsections (b) and (c), that is, as to the employees of the Union and trust fund personnel. However, it is obvious that insofar as subsection (a) is concerned, the definition of "employee" far from enlarging its meaning clearly *limits* it to "covered" employees, else the definition would serve no purpose whatever. It follows that the right of inspection is expressly limited to the records of "covered" employees.

Id. 618-19. We are persuaded by and concur with the Eighth Circuit's reasoning on this point.

Article I, sections 3(a), (b), (c) and (d) are provisions of inclusion. In contrast, Article I, section 3(e), on which the District Court relied, and section 3(f) are provisions of exclusion. Article 1, sections 3(e) and (f) merely qualify the employee status as defined in sections (a), (b), (c) and (d). Article I, section 3(e), limits "employee" as defined in the first four provisions to individuals who are not independent contractors or are otherwise outside of the control of the employer as determined by the common law master-servant relationship test or by statutory definition. The Funds might, for example, hire independent auditors to audit Transport's records. They would be exempt from employee status under Article I, section 3 of the trust agreements, which would absolve the trustees from any obligation to make weekly contributions to the Funds on their behalf. Similarly, Article I, section 3(f) limits employee status to individuals who do meet the requirements of the reasonable rules established by the trustees with regard to the continuation of employment status. That sections 3(e) and (f) qualify earlier provisions rather than provide an independent basis for the determination of employee status is indicated by their form, in contrast to that of earlier provisions. Article I, section 3 begins: "The

term '[e]mployee' as used herein shall include: (a) [a] person . . . (b) [a]ll persons . . . (c) [a]ll persons . . . and (d) [a]ll persons . . . ." In contrast, Article I, sections 3(e) and (f) do not contain similar language. Sections 3(a), (b), (c) and (d) are similarly joined grammatically; they are linked into a continuous thread by the use of semi-colons and use of the disjunctive "or." Sections 3 (e) and (f) are each separate sentences. Sections 3 (a), (b), (c) and (d) also differ from sections 3(e) and (f) in their substance. Section 3(f) clearly does not purport to provide an independent basis for the determination of employee status.

A determination that none of the provisions of Article I, section 3 confer employee status on Transport's non-covered employees is also supported by several arguments of construction. If, as the Funds assert, non-covered employees of Transport are employees within the meaning of Article I, section 3 for purposes of investigation and disclosure under Article III, section 5, then they must be treated as Article I, section 3 employees in every other instance in the trust agreements where the term "employee" is used. The practical consequence of such a construction is that the trustees are responsible to non-covered Transport employees just as they are to covered Transport employees and the Funds are required to treat such non-covered employees as Article I, section 3 "employees" for the purposes of the Funds' coverage and benefits. This was clearly not the intent of the parties to the collective bargaining agreements because Transport is obligated to contribute weekly sums to the Funds only for covered employees.

Limiting Article I, section 3 to covered employees of Transport is consistent with the bargained-for benefit negotiated on behalf of Transport's covered employees only. It would be incongruous if covered employees, through the Union, could negotiate provisions for themselves that invade the province of Transport's company benefit plan for non-covered em-

ployees and impinge upon the privacy of non-covered employees' records and documents.

Confining the Article I, section 3 definition of employee to covered employees of Transport provides symmetry between the definitions of "employer" in the trust agreements and the employer's responsibilities to the Funds under the collective bargaining agreements and the definitions of "employee" in the trust agreements. Under the trust agreements an employee must be employed under the terms of a collective bargaining agreement *and* be a person on whose behalf the employer is required to make contributions to the Funds. Parallel with this definition of employee, an employer under the trust agreements must be subject to a collective bargaining agreement *and* make contributions to the Funds for covered employees under the terms of a collective bargaining agreement. To include non-covered employees within the definition of employees throws out this symmetrical relationship and replaces it with one where the employer contributes to the Funds only for covered employees yet a broader class of employees, consisting of covered and non-covered employees, are subject to the Funds and have rights under them.

Finally, allowing Article I, section 3 (e) to be an independent grant of employee status rather than a qualification of sections 3(a), (b), (c) and (d), would negate the purpose of section 3(a) as it applies to Transport and sections (b) and (c) as they apply to the Union and trustees because (e) would be a broader, all encompassing provision in contrast to the narrow, more defined ones of sections 3 (a), (b), (c) and (d). The parties could easily have used the ERISA definition of employee, expressly stated that employee includes *all* employees of the employer, or placed section 3 (e) first and then narrowed it had they intended the definition of employee in the trust agreements to include non-covered employees of Transport. Because none of these alternatives were adopted and because the construction urged by the Funds works a radical extension of the definition of employee, not

only for purposes of disclosure and investigation under Article III, section 5, but for all other articles and sections in which the term appears, it cannot be said that the intent of the parties was to include non-covered employees of Transport within the definition of employee in the trust agreements.

In addition to requiring each employer to furnish the names and other specifically denominated information pertaining to employees, Article III, section 5 continues that an employer shall furnish to trustees "such other information as the Trustees may reasonably require in connection with the administration of the Trust." Trustees, through their representatives, may also examine the pertinent records of an employer at the employer's place of business whenever necessary or advisable by the trustees for the proper administration of the trust. The Funds argue that this general language in Article III, section 5 gives the trustees the power and authority to investigate and obtain information not limited to Transport's covered employees.

In *CRST, Inc.*, the Eighth Circuit addressed this general language and concluded that "[i]n . . . context, this language can only refer to information reasonably required as to 'covered' employees additional to the records specifically listed." *CRST, Inc., supra*, 619. We reach the same conclusion. Similarly, the authorization to examine pertinent records of the employer in the second sentence of Article III, section 5 is so qualified.

Therefore, the trustees do not have a contractual right to audit the records of all of Transport's employees under Article III, section 5. Non-covered employees of Transport are not employees within the meaning of Article I, section 3 of the trust agreements and therefore, neither can be nor are participants and beneficiaries of the Funds to whom the trustees owe a duty. 29 U.S.C. § 1104(a)(1). *See CRST, Inc., supra*, 618. Nor do the trustees have the per se right under the general language of Article III, section 5, to audit the records of all of Transport's employees. 29 U.S.C. § 1104(a)(1)(D).

The Funds also argue that Article IV of the trust agreements give the trustees the right to audit the records of all of Transport's employees. Article IV of the trust agreements gives the trustees the authority to control and manage the operation and administration of the trust in accordance with applicable law. Section 2 of Article IV requires the trustees to hold, manage, care for and protect the trust fund and collect the income therefrom and contributions thereto. Article IV, section 14(e) states that the "[t]rustees are . . . empowered, in addition to such other powers as are set forth herein or conferred by law . . . [t]o do all acts, whether or not expressly authorized . . . , which the [t]rustees may deem necessary or proper for the protection of the property held . . . [in trust]." With regard to their rule-making power, Article IV, section 9 provides that the trustees are authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the trust. Section 9 continues that all rules and regulations adopted by the trustees for the administration of the trust fund shall be binding on Transport and the Union, all parties dealing with the trust, and all persons claiming benefits. Article IV, section 17 provides that the trustees have the power to construe the provisions of the trust agreement and any construction adopted by them in good faith shall be binding on Transport, the Union and the employees.

The broad language of Article IV of the trust agreements does not, however, give the trustees *carte blanche* powers to undertake an audit of the records of all of Transport's employees. They are limited in their discretion by ERISA and the common law concept that a trustee may only act within the scope of his or her authority. Neither the express terms of ERISA, the collective bargaining agreements nor the trust agreements give the trustees the broad right of inspection and investigation they seek for their audit and we have already held that only employees covered by a collective bargaining

agreement may be considered "participants" in the Funds to whom fiduciary obligations are owed. We hold, however, that the terms of Article IV of the trust agreements, which are incorporated into ERISA's mandate that the trustees act in accordance with all plan documents and instruments,[4] give the trustees the power and authority to inspect Transport's books and records and question such persons as they deem necessary to enable them to determine facts relative to a particular employee's covered or non-covered status if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement, i.e., is doing bargaining unit work, but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee.

A limited right of investigation and inspection beyond the express provisions of the trusts based on a "reasonable cause" standard is supported by several factors. Under Article IV, section 14(e), which is incorporated into ERISA's statutorily imposed duties by 29 U.S.C. § 1104(a)(1)(D), the trustees' express powers are augmented by implied powers to do what is necessary or proper for the protection of trust property. Under the common law of trusts, a trustees' powers are similarly divided into those that are expressly granted the trustee in the governing instruments and powers that are inferred or implied. Powers may be inferred or implied from the terms of the governing instruments read as a whole, from an express directive to accomplish a particular goal unaccompanied by express directives on the ordinary and natural means of obtaining that result, and from the purposes of the trust. Bogert, *Trusts and Trustees*, § 551 Trustee's Power in General (2d ed. 1980).

Article IV, section 2 of the trust agreements expressly requires the trustees to protect the trust fund by collecting

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[4] 19 U.S.C. § 1104.

contributions from employers such as Transport. Article IV, section 14(e) expressly requires the trustees to protect trust assets. To protect trust assets, the trustees must ensure that contributions to the Funds correlate with the disbursement of benefits from them. Entitlement to Funds' benefits may be established by a concession amongst the parties that a particular individual is a covered employee or a person otherwise entitled to the Funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee. *See Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). To ensure that sufficient contributions are collected to correlate with benefits due those employees whose coverage is uncontested and those adjudicated to be entitled to benefits by an arbitrator or court and to comport with the congressional policy of protecting employee benefit rights, some limited right of inspection and investigation may be implied both from the terms of the trust agreements and from the common law of trusts.

We determine that this limited right of inspection and investigation is confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee. The "reasonable cause" req rement is supported by the statutorily imposed "*prudent man*" standard contained in ERISA, 29 U.S.C. § 1104(a)(1)(B). The same statutory provision requires a trustee to discharge his duties solely in the interests of the participants and beneficiaries of the Funds and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying the *reasonable expenses* of administering the plan. *Id.* § 1104(a)(1)(A)(i-ii). Given a limited duty to investigate on one hand, there must be a concommitant duty on the other not to undertake unreasonable

investigations or inspections to pursue employee coverage or waste trust assets by unreasonably broad audits. The record as a whole indicates that the Funds are among the largest Taft-Hartley trust funds in the United States, that more than 13,000 employers participate and that they serve more than 500,000 employees whose job classifications are covered in thousands of collective bargaining agreements. The record also indicates that the majority of Transport's employees are not covered by a collective bargaining agreement. The requested audit of the records of all of Transport's employees attempted by the trustees, with its attendant intrusion into the employment records of non-covered employees who did not bargain for this intrusion, was apparently triggered in large part by the receipt of monies for four employees whose coverage was not disclosed by the Union seniority list, Transport or the Union, and instances of under reporting for covered employees. A prudent man would not authorize an audit of the records of all of Transport's employees under these circumstances. The decision to do so would be arbitrary and capricious. Nor could a determination that the expenses of such an audit be reasonable be sustained.

The reasonable cause standard also corresponds with the standard imposed on the Department of Labor in investigations of possible ERISA violations, 29 U.S.C. § 1134(a)(2).[8]

In addition, a "reasonable cause" standard protects the trustees without doing great violence to traditional labor relations. Coverage under the terms of a collective bargaining agreement has traditionally been within the province of the employer and union. The collective bargaining agreements entered into between Transport and the Union in this case contain a grievance clause which may only be invoked by Transport or the Union in the event any individual's status

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[8] It seems unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records.

as a covered or non-covered employee under the collective bargaining agreements comes into dispute. The Funds have no contractual right to participate in this dispute resolution process. The "reasonable cause" standard strikes a balance between the trustees' needs to satisfy their statutory and contractual obligations in the limited situations in which the investigation of proper Funds' contributions are warranted yet preserves the privacy and integrity of the grievance and arbitration provisions agreed to by Transport and the Union as a means of resolving questions of employee coverage.

Finally, a "reasonable cause" standard for inspection and investigation of an employee who has not been placed on the Union seniority list or otherwise classified by the Union or Transport as a covered employee, limits the possibility of intrusion into the records of non-covered employees who have not bargained for the intrusion to particular situations where the intrusion is factually warranted. This preserves and promotes confidentiality of non-covered employee records.

For the above-mentioned reasons we conclude that Article IV of the trust agreements, incorporated into ERISA, 29 U.S.C. § 1104, gives the trustees the power and authority to inspect Transport's books and records relative to the covered or non-covered status of the four employees on whose behalf Transport made weekly contributions to the Funds but who were not placed on the Union seniority list or otherwise classified by Transport or the Union as covered employees. Their decision to audit the records of these four employees under the terms of the trust agreements is neither arbitrary nor capricious. They may also examine records relating to admittedly covered employees which are necessary to determine when their coverage began and ended or the proper amount of contributions. They may also be entitled to other records such as drivers' logs which relate only to covered employees. It would appear that all truck drivers employed by Transport are covered by the collective bargaining agreements. Under the "reasonable cause" standard, however, we

find the trustees' attempt of an audit of the records of all of Transport's other non-covered employees to be arbitrary and capricious. An audit of the records of all of Transport's employees is outside of their statutorily and contractually imposed duties, express or implied, as a matter of law and the District Court erred in construing the agreements to the contrary.

III. NLRB Disclosure Rules

The Funds argue that they have a right to all employee information by analogy to the NLRB disclosure rules. 29 U.S.C. § 158 imposes a statutory duty to bargain collectively and fairly. The courts have concluded that this duty to bargain includes a duty to provide, upon request, information relevant to bargainable issues. *NLRB* v. *Rockwell-Standard Corp., Transmission and Axle Division, Forge Division,* 410 F.2d 953, 957 (6th Cir. 1969). The Funds argue that this concept applies by analogy to allow it to obtain information on all Transport employees. The standard of disclosure in labor cases is distinguishable here for several reasons: this case involves multi-employer benefit plans, not collective bargaining agreements, and the Funds are trustees, not parties to the collective bargaining process. Even if the standard of disclosure in labor cases is applied by analogy, that standard requires that the solicitor of such information bear the burden of showing relevance and satisfying the reviewing tribunal that the rights of the company whose information is to be disseminated are taken into account. *Kroger Co.* v. *NLRB,* 399 F.2d 455, 457 (6th Cir. 1968). Again, concern over the status of four employees is urged to justify an investigation into the records of all Transport's employees. This does not satisfy the relevancy test nor protect the interest of Transport's non-covered employees or Transport.

IV. Impact on Duties of The Trustees and the Funds

In bringing this suit, the trustees have argued that they and the Funds would be subject to liability if they are prevented from undertaking the sweeping and generalized audit they have attempted. Therefore, the right of investigation and inspection they have requested should be honored. While the issue of whether the trustees could breach their fiduciary duties by failing to conduct such an audit is not before us, nor is the Funds' liability to a participant for whom no employer contribution has been made, it would appear that both the trustees and the Funds are adequately protected. With respect to the personal liability of the trustees for an alleged breach of fiduciary duty, we note that a trustee may only act within the scope of his or her authority. To the extent that authority is limited by law, as we have found the trustees' ability to investigate and inspect under the statute and contractual provisions is limited in the case on appeal, there can be no breach of duty by the trustees for failing to undertake a more sweeping audit. A trustee may properly rely on limits to his or her authority imposed by the trust agreement and by law. *See Central States, Southeast and Southwest Area Pension and Health and Welfare Funds* v. *McNamara Motor Express Co., Inc.*, 503 F. Supp. 96, 101 (W.D. Mich. 1980).

The Funds enjoy a number of protections against being called upon to dispense benefits to a participant on whose behalf no contributions or insufficient contributions were made. The Funds and the Secretary of Labor may inspect and investigate employee records where coverage is unclear under the "reasonable cause" standard. 29 U.S.C. § 1134. Further, the Union has a strong interest in seeing that Transport's employees are within the collective bargaining agreements. Employees also have a strong interest in being included in the collective bargaining unit. The reporting requirements of 29 U.S.C. § 1021 may be expected to put an employee on

notice of his or her participant or nonparticipant status. An employee seeking benefits in such a case might be subject to an estoppel argument. Finally, the Funds, if liable, may well have a recoupment action against an employer for unpaid contributions. Therefore, we determine that the possibility of liability alone on the part of the trustees or the Funds does not justify the broad audit they seek because adequate protections appear to exist to protect them.

Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 81-1757

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Plaintiffs-Appellees,

vs.

CENTRAL TRANSPORT, INC., et al.,

Defendants-Appellants.

Before: LIVELY and KENNEDY, *Circuit Judges;* and WILHOIT, *District Judge.*

JUDGMENT
(Filed: January 20, 1983)

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Defendants-Appellants recover from Plaintiffs-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

Appendix C

ENTERED BY ORDER OF THE COURT
John P. Hehman, *Clerk*
(s) John P. Hehman, *Clerk*

A True Copy.

Attest:
(s) Linda L. Brinson
Deputy Clerk

Issued as Mandate:
April 18, 1983

COSTS: NONE

Filing fee ..... $
Printing ..... $
Total ..... $

APPENDIX D
No. 81-1757

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS HEALTH and WELFARE FUND,
Plaintiffs-Appellees,

v.

CENTRAL TRANSPORT, INC., et al.,
Defendants-Appellants.

ORDER
(Filed: April 8, 1983)

Before: LIVELY and KENNEDY, *Circuit Judges;* and WILHOIT,* *District Judge.*

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

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* Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

APPENDIX E
Relevant provisions from the National Master Freight Agreement, 1976-1979:*

ARTICLE 2.
Scope of Agreement
Section 1.
Master Agreement

The execution of this Natl. Master Frt. Agreement on the part of the Employer shall cover all operations of the Employer which are covered by this Agreement, and shall have application to the work performed within the classifications defined and set forth in the Agreements supplemental hereto.

ARTICLE 54.
Health and Welfare Benefits

Effective April 1, 1976, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, which is to be administered jointly by the parties, the sum of twenty-four dollars and fifty cents ($24.50) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. Effective April 1, 1977, the weekly contribution shall be increased to twenty-seven dollars and fifty cents ($27.50). Effective April 1, 1978, the weekly contribution shall be increased to twenty-nine dollars and fifty cents ($29.50).

Employers presently making payments to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and Employers who may subsequently begin to make payments to such Fund, shall continue to make such payments for the life of this Agreement.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties

hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Contributions to the Health and Welfare Fund must be made for each week on each regular employee even though such employee may work only part time under the provisions of this Agreement, including weeks where work is performed for the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other health and welfare fund.

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week.

Contributions shall be made for any regular employee on layoff who is worked one (1) day in any week for any reason.

Action for delinquent contributions may be instituted by either the Local Union, the Area Conference or the Trustees.

Employers who are delinquent must also pay all attorney's fees and costs of collections.

Effective May 17, 1976, the Employer shall pay to all casual employees an additional fifty (50) cents per hour up to a maximum of four dollars ($4.00) for any shift that such casual employee works. This payment will be in lieu of contributions to the Central States, Southeast and Southwest Areas Health and Welfare Fund and will not be subject to any premium pay provisions of this Supplemental Agreement.

ARTICLE 55.
Pensions

Effective April 1, 1976, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST, and SOUTHWEST AREAS PENSION FUND the sum of twenty-five dollars ($25.00) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. Effective April 1, 1977, the weekly contributions shall be increased to twenty-eight dollars ($28.00) per week. Effective April 1, 1978, the weekly contribution shall be increased to thirty-one dollars ($31.00).

This fund shall be the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. There shall be no other pension fund under this Agreement for operations under this Agreement or for operations under the Southern Conference Area Agreements to which Employers who are party to this Agreement are also parties.

Appendix E

By the execution of this Agreement, the Employer authorizes the Employer's Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months.

If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Contributions to the Pension Fund must be made for each week on each regular employee, even though such employee may work only part-time under the provisions of this Agreement, including weeks where work is performed for the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other pension fund. Contributions shall be made for any regular Employee on lay-off who is worked one (1) day in any week for any reason.

Appendix E

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week.

Effective May 17, 1976, the Employer shall contribute to the Central States, Southeast, and Southwest Areas Pension Fund the sum of six dollars ($6.00) for each tour of duty each casual employee works.

Action for delinquent contributions may be instituted by either the Local Union, the Area Conference or the Trustees. Employers who are delinquent must also pay all attorney's fees and costs of collection.

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*Included in the Sixth Circuit "Joint Appendix"

APPENDIX F
Relevant provisions of the Trust Agreement governing the Central States Pension Fund*

ARTICLE I
DEFINITION OF TERMS

Sec. 3. Employee — The term "Employee" as used herein shall include:

(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; or

(b) All persons employed by the Union, upon being proposed by the Union and after acceptance by the Trustees; and as to such Union personnel the Union shall be considered an Employer solely for the purposes of contributions within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits; or

(c) All persons employed by the Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees; and as to such Trust personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits.

(d) All persons who are Trustees of Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances the common law test, or the applicable statutory definition; or master-servant relationship shall control employee status.

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

ARTICLE III
CONTRIBUTIONS AND COLLECTIONS

Sec. 1. Amount of Contributions — Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties. The obligation to make such contributions shall continue during periods when the collective bargaining agreement is being negotiated, but such contributions shall not be required in case of strike after contract termination, unless the parties mutually agree otherwise.

Sec. 3. Receipt of Payment and Other Property of Trust — The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the Employers to the Trust Fund, and the Trustees are hereby vested with all right, title and interest in and to such moneys and all interest accrued thereon, and are authorized to receive and be paid the same. The Trustees agree to receive all such payments, deposits, moneys, insurance and

annuity contracts, and other assets and properties described or referred to in Article II and this Article, and to hold same in Trust hereunder for the uses and purposes of the Trust herein created.

Sec. 4. Collections and Enforcement of Payment — The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint, or the Executive Director when directed by such committee or by the Trustees, shall have the power to demand and collect the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose. The Trustees are authorized to receive all Employer contributions and apply such contributions first to any interest due, and then to the oldest unpaid balance of contributions due. Nothing herein shall give any Employer the right to designate how any contributions shall be applied.

Sec. 5. Production of Records — Each Employer shall promptly furnish to the Trustees, upon reasonable demand the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files and such other information as the Trustees may reasonably require in connection with the administration of the Trust. *The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.* All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether:

(a) the organization is a corporation and the names of all of its officers;

(b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor.

The Union will comply with any reasonable request of the Trustees to examine those records of the Union which may indicate the employment record of any Employee whose status is in dispute. The names and addresses of participants and beneficiaries are confidential information not to be disclosed by the Trustees except as required by an order of a court of competent jurisdiction, except where necessary for determination of benefits in accordance with the provisions of this Trust Agreement, or as required by law.

(emphasis supplied)

Appendix F

ARTICLE IV
POWERS AND DUTIES OF TRUSTEES

Sec. 1. The Trustees shall have authority to control and manage the operation and administration of the Trust in accordance with applicable law.

Sec. 2. The Trustees shall hold, manage, care for, and protect the Trust Fund and collect the income therefrom and contributions thereto, except to the extent that any of these functions or responsibilities are assigned to another entity or entities pursuant to any provision of this Article.

Sec. 6. The Trustees shall engage one or more independent qualified public accountants and enrolled actuaries to perform all services required by and in accordance with applicable law and such other services as the Trustees deem necessary.

Sec. 9. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of the Agreement, and the Articles in the Central States, Southeast and Southwest Areas Agreements creating the Pension Fund. All rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust, and all persons claiming any benefits hereunder.

Sec. 14. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

• • • •

(e) To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

Sec. 17. The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the Pension Plan; and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers.

ARTICLE V
CONTROVERSIES AND DISPUTES

Sec. 2. All questions or controversies, of whatsoever character, arising in any manner or between any parties or persons in connection with the Fund or the operation thereof, whether as to any claim for any benefits preferred by any participant, beneficiary, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or of this instrument, or as to any writing, decision, instrument or accounts in connection with the operation of the Trust Fund or otherwise, shall be submitted to the Trustees, or to a committee of Trustees, and the decision of the Trustees or of such committee thereof shall be binding upon all persons dealing with the Fund or claiming any benefit thereunder. To the extent this section is contrary to or inconsistent with the June 30, 1977 Agreements, this section shall be inapplicable.

ARTICLE XIII
VESTING OF RIGHTS

The Trustees shall establish standards for the vesting of benefits which conform to no less than the minimum standards required by law. No Employee or other person shall have any vested interest or right in the Trust Fund except as provided by the Trustees in conformance with applicable law.

Appendix F

ARTICLE XIV
MISCELLANEOUS

Sec. 4. Non-payment by an Employer of any moneys due shall not relieve any other Employer from his obligation to make payment. In addition to any other remedies to which the parties may be entitled, an Employer shall be obligated to pay interest at the rate of eight (8) per cent per annum on the moneys due to the Trustees from the date when the payment was due to the date when the payment is made, together with all expenses of collection incurred by the Trustees, including, but not limited to, attorneys' fees and such fees for late payment as the Trustees determine and as permitted by law.**

Sec. 7. This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

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* The Trust Agreement for the Central States Health and Welfare Fund contains almost identical provisions.

** This Section has been amended to conform with 29 U.S.C. 1132(g)(2), enacted on September 26, 1980.

APPENDIX G

I. LABOR-MANAGEMENT RELATIONS ACT

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept,

any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assign-

ment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended

to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited

from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated

benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.
Pub.L. 93-406, Title I, §2, Sept. 2, 1974, 88 Stat. 832.

§ 1021. Duty of disclosure and reporting

Summary plan description and information to be furnished to participants and beneficiaries

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025 (a) and (c) of this title.

Plan description, modifications and changes, and reports to be filed with Secretary of Labor

(b) The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary—

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

§ 1023. Annual reports

Publication and filing

(a)(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be

made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) An actuarial statement and opinion, as required by paragraph (4) of this subsection.

• • • •

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 1024(b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report.

In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 1024(a)(2) of this title a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) of this section prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

• • • •

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section—

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

• • • •

Financial statement

(b) An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; • • • •

Information to be furnished by administrator

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

• • • •

Actuarial statement

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

• • • •

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more

frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

§ 1024. Filing and furnishing of information

Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

(a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modification or change is adopted or occurs, as the case may be.

• • • •

(4) The Secretary may reject any filing under this section—

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 1023(a)(3)(A) or section 1023 (a)(4)(B) of this title.

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions—

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

Publication of summary plan description and annual report to participants and beneficiaries of plan

(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year,

described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

Statement of rights

(c) The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this subchapter.

§ 1025. Reporting of Participant's benefit rights

Statement furnished by administrator to participants and beneficiaries

(a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

§ 1027. Retention of records

Every person subject to a requirement to file any description or report or to certify any information therefor

under this subchapter or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 1024(a)(2) or (3) of this title shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under section 1024(a)(2) or (3) of this title. Pub.L. 93-406, Title I, § 107, Sept. 2, 1974, 88 Stat. 850.

§ 1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 1053 (b)(3)(A) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any

12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

(b) If any person who is required, under subsection (a) of this section, to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

§ 1052. Minimum participation standards

• • • •

(3)(A) For purposes of this section, the term "year of service" means a 12-month period during which the employee has not less than 1,000 hours of service. For purposes of this paragraph, computation of any 12-month period shall be made with reference to the date on which the employee's employment commenced, except that, in accordance with regulations prescribed by the Secretary, such computation may be made by reference to the first day of a plan year in the case of an employee who does not complete 1,000 hours of service during the 12-month period beginning on the date his employment commenced.

(C) For purposes of this section, the term "hour of service" means a time of service determined under regulations prescribed by the Secretary.

§ 1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

• • • •

(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account • • • •

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 1052(a)(3)(C) of this title.

• • • •

29 C.F.R. 2530.200b-2

§ 2530.200b-2 Hour of service.

(1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.

Appendix G

DEPARTMENT OF LABOR ADVISORY OPINION LETTERS ON DELINQUENT CONTRIBUTIONS*

August 31, 1976
Opinion 76-89
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(Re: 10 Civil Actions)

Dear Mr. Dower:

The Secretary of Labor has been served with copies of complaints filed on your behalf in the above-cited cases. While at the present time we do not propose to exercise our right to intervene in any of these cases pursuant to section 502 (h) of the Employee Retirement Income Security Act of 1974 (ERISA), we nonetheless wish to inform you of our views on two matters referred to in your complaints.

> Paragraph 11 of each of your complaints states:
> Unless the Pension Fund receives the contributions due it and can credit the same to the Defendant's employees, those employees will not be entitled to credit for hours worked which will result in their ineligibility for pension benefits upon retirement.

Without expressing any opinion on the law as it existed prior to the effective date of the Employee Retirement Income Security Act of 1974 (ERISA), I would advise you that in our opinion the substance of the position expressed in that paragraph is not lawful under ERISA. ERISA sections 202, 203, and 204, 29 U.S.C.A. §§1052, 1053 and 1054, set minimum participation, vesting and benefit accrual standards which are binding on all covered pension plans. All three sections provide that the satisfaction of their requirements be based solely on each participant's years of service. A "year of service" is defined as the completion of 1,000 hours of service within a designated 12-month period.

The definition of the term "hour of service" was specifically reserved for determination by the Secretary of Labor through appropriate regulations.

On September 8, 1975, a definition of the term "hour of service" was published in the *Federal Register*. Section 2530.200b-2(a)(1) states, "An hour of service is each hour for which an employee is directly or indirectly paid, or entitled to payment, by the employer for the performance of duties during the applicable computation period . . ." Although the Department of Labor will be making certain modifications in these regulations, none of the proposals under consideration would cause a change *in our present position that credit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees' resolution to the contrary is, in our judgment, unlawful and unenforceable.*

• • • •

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THE BUREAU OF NATIONAL AFFAIRS, INC.,
WASHINGTON, D.C. 20037

December 5, 1978

OPINION 78-28 A

202
203
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404(a)
406
408(c)
410(a)

Harry A. Dower, Esq.
Dower, Yarema & Co., P.C.
First Valley Bank Building
Center Square
P.O. Box 950
Allentown, Pennsylvania 18105

Re: Central Pennsylvania Teamsters Pension Fund and Teamsters Local 429 Health and Welfare Fund

Dear Mr. Dower:

This is in response to your correspondence of April 18, 1977, May 24, 1977, and August 8, August 16, August 21,

August 31, and November 9, 1978, in which among other matters you request advisory opinions regarding the collection of delinquent employer contributions and the crediting of service in a pension benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA). In addition, you request an advisory opinion regarding the compensation of the trustees of the subject plans. You have supplied us with plan documents and other information. . . . . .

With respect to the first matters mentioned above, you request an opinion whether a multiemployer pension plan may provide that a participant shall accrue benefits only upon the payment of contributions by the employer required to make such contributions. You also request an opinion whether there is an extension of credit by a multiemployer plan to a party in interest where a contributing employer is delinquent in making its required contribution to the plan and the trust instrument provides that the trustees of the plan have no obligation to collect delinquent employer contributions. In connection with this request you also inquire whether the trustees, in the exercise of their discretion under the trust instrument, may adopt a policy not to sue for the collection of delinquent employer contributions.

With regard to the question of whether benefit accrual may be limited to hours for which contributions are received, sections 202, 203 and 204 of ERISA set forth the minimum standards for participation, vesting and benefit accrual. The Department is of the view that, at least for purposes of participation and vesting, credit may not be limited to service for which contributions are actually made. Where no distinction is made between credit for vesting and credit for accrual, all credit must be given solely on the basis of service performed for an employer sponsoring the plan, regardless whether that employer is required to con-

tribute for such service or has made or defaulted on his required contributions.[1] Accordingly, those provisions of the plan documents you submitted which limit employee entitlement by reference to the receipt of employer contributions are not, in our opinion, lawful under ERISA.

Concerning the collection of delinquent employer contributions, you argue that nothing in ERISA directly obligates plan trustees to collect such contributions. You further argue that it is only in connection with an extension of credit by a plan to a party in interest, prohibited under section 406(a)(1)(B) of ERISA, that the question arises. Your letter concludes that, in a multiemployer plan, where the terms of the plan state that no benefit credit will be given until a contribution is actually received by the plan even though a participant has performed the required hours of service, there is no extension of credit to a party in interest and therefore no prohibited transaction.

We do not agree with your argument that, because the plan does not become obligated to pay benefits with respect to particular service until the relevant contribution is received, failure to collect the contribution does not result in an extension of credit by the plan. This is because we do not agree with your premise that benefit credit can be withheld until the contribution is received. As stated above, it is the opinion of the Department that credit must be given on the basis of service, regardless of whether the employer is required to contribute for such service or has made or defaulted on required contributions.

Moreover, in Prohibited Transaction Exemption 76-1 (41 FR 12740, March 26, 1976), the Department stated that multiple employer plans which do not establish and implement reasonable, diligent and systematic collection procedures may be found to be engaging in prohibited transactions under sections 406 and 407(a) of ERISA. The Department also stated that arrangements, agreements or under-

standings whereby a multiple employer plan agrees to the late or delayed payment of employer contributions or payment of less than the full amount of a delinquent contribution, or writes off such a contribution as uncollectable, may also constitute prohibited transactions under those sections.

The collective bargaining agreement which you forwarded to this office requires, in Articles 49 and 50, that employers make contributions to the welfare plan and the pension plan, respectively. The plan trustees are in a position to enforce that duty on behalf of the two plans, and their failure to do so could, in our judgment, result in a violation of section 404(a) of ERISA. To the extent that section 404(a) imposes upon the trustees a duty to collect delinquent contributions, any provision in the plan instruments purporting to relieve the trustees of that duty, or of the power to carry it out, is void under section 410(a).

§ 1102. Establishment of plan

Named fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite features of plan

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the

*emphasis supplied

objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

§ 1103. Establishment of trust

Benefit plan assets to be held in trust; authority of trustees

(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan,

• • • •

§ 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

§ 1105. Liability for breach of co-fiduciary

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Assets held by two or more trustees

(b)(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

Investment managers

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

§ 1106. Prohibited transactions

(a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

• • • •

(B) lending of money or other extension of credit between the plan and a party in interest;

• • • •

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

• • • •

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Pub.L. 93-406, Title I, § 515, as added Pub.L. 96-364, Title III, § 306(a), Sept. 26, 1980, 94 Stat. 1295.)

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

• • • •

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

• • • •

(b)(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

§ 1134. Investigative authority

(a) The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder—

(1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and

(2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

APPENDIX H
UNITED STATES DISTRICT COURT*
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Plaintiffs,

vs.

CENTRAL TRANSPORT, INC., et al.,
Defendants.

Case No. 80-71872
Hon. Anna Diggs Taylor

RUSSELL N. LUPLOW (P16863)
CHARLES J. TAUNT (P24589)
Attorneys for Plaintiffs

PATRICK A. MORAN (P17591)
DANIEL F. BERRY (P24864)
Attorneys for Defendants

AFFIDAVIT OF JOHN P. O'SULLIVAN

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

John P. O'Sullivan, being first duly sworn, deposes and states as follows:

1. That he is currently employed as the Manager of the Field Employer Audit Department of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, Plaintiffs herein. In such capacity he has primary supervisory responsibility for field audits of employers who participate in the Plaintiff Funds.

2. Affiant has primary supervisory responsibility for Plaintiffs' attempted audit of Defendants which took place between February 4, 1980 and March 28, 1980.

3. As a result of Plaintiffs' preliminary and incomplete findings as of the present date, Plaintiffs have been able to determine that substantial sums are owed from Defendants to Plaintiffs for pension and health and welfare contributions on behalf of Defendants' employees.

4. Affiant has determined, as a result of the preliminary and incomplete audit findings secured during the attempted audit of Defendants, that Defendants (collectively) are indebted to Plaintiff Pension Fund for at least the amount of One Hundred Seventy-two Thousand Three Hundred Three and 50/100 ($172,303.50) Dollars. As an example and by way of illustration and not by way of limitation, Defendants (collectively) are indebted to Plaintiff Pension Fund in the following amounts:

a. $58,679.50 as a result of Defendants' failure to report newly hired employees to Plaintiff on a timely basis;

b. $36,530.50 as a result of Defendants' reporting to Plaintiff of premature termination dates for their employees;

c. The sum of $5,530.00 as a result of Defendants' failure to remit contributions on behalf of employees who worked part of a week during which those employees were on strike;

d. The sum of $933.00 as a result of Defendants' failure to submit contributions to Plaintiff on behalf of employees who were on sick leave under circumstances which required Defendants to make contributions to Plaintiff.

5. Affiant has determined, as a result of the preliminary and incomplete audit findings secured during the attempted

audit of Defendants, that Defendants (collectively) are indebted to Plaintiff Health and Welfare Fund for at least the amount of Ninety-six Thousand Fifty-nine ($96,059.00) Dollars. As an example and by way of illustration and not by way of limitation, Defendants (collectively) are indebted to Plaintiff Health and Welfare Fund in the following amounts:

a. $34,034.00 as a result of Defendants' failure to report newly hired employees to Plaintiff on a timely basis;

b. $17,735.00 as a result of Defendants' reporting to Plaintiff of premature termination dates for their employees;

c. $2,911.50 as a result of Defendants' failure to remit contributions on behalf of employees who worked part of a week during which those employees were on strike;

d. $303.00 as a result of Defendants' failure to submit contributions to Plaintiff on behalf of employees who were on sick leave under circumstances which required Defendants to make contributions to Plaintiff.

Further affiant says not.

(s) John P. O'Sullivan

Subscribed and sworn to before me
this 3rd day of September, 1980.

(s) Susan Elaine Gierak, *Notary Public*,
Wayne County, MI. My commission
expires: 3-19-83.

Appendix H

AFFIDAVIT OF JUANITO P. PASIA

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Juanito P. Pasia, being first duly sworn, deposes and states as follows:

1. That he is currently employed as an In-Charge Auditor by the Employer Audit Department of the Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter collectively referred to as "Central States").

2. That he was a member of Plaintiffs' audit team which attempted to perform an audit of the various corporate Defendants during the period February 4, 1980 through March 28, 1980.

3. During the course of Plaintiffs' attempted audit of the Defendants, Plaintiffs' auditors were directed to communicate with Mr. Robert Sigler as the representative of the corporate Defendants.

4. All requests for information, records, and documentation by Plaintiffs were directed to Mr. Sigler.

5. The only documents which Defendants voluntarily supplied to Plaintiffs during the course of the attempted audit were:

a. Defendants' payroll registers for those individuals upon whom Defendants contend they are under a legal obligation to submit contributions to Plaintiffs;

b. Defendants' insurance exception listing. This is a document generated by Defendants on a monthly basis which lists those individuals and time periods for which Defendants contend they are under a legal obligation to

make contributions to Plaintiffs as well as other employee benefit plans;

c. Defendants' 941 reporting form for the period April 1, 1977 through June 30, 1977 only;

d. Road driver attendance record. This document lists some, but not all, of the truck drivers employed in some of Defendants' special handling division and indicates, on a weekly basis, whether the individuals worked during a given week;

e. Employee Billing Change and Correction Forms. These are documents which are submitted to Plaintiffs on a monthly basis to advise Plaintiffs of changes in the employment status for those individuals for whom Defendants contend they are under a legal obligation to submit contributions to Plaintiffs. The originals of all of these documents had previously been submitted to Plaintiffs;

f. Plaintiffs' monthly bills to Defendants;

g. Remittance forms for the Michigan Conference of Teamsters Welfare Fund. This Welfare Fund is an employee benefit plan which is separate, distinct and unrelated to Plaintiffs;

h. Check vouchers for checks previously sent to Plaintiffs;

i. Defendants' worksheets supporting their monthly remittances to Plaintiffs.

6. The documents listed in the preceding numbered paragraphs 5(c) through 5(g) were of no use whatsoever to Plaintiffs in their attempt to conduct an audit of Defendants.

7. Defendants refused to provide any additional papers, records, documents or documentation other than as set forth in paragraph 5.

8. Prior to the commencement of the audit Defendants had reported to Plaintiffs that the following individuals were employed by them pursuant to a collective bargaining agreement which required contributions to be made on their behalf to Plaintiffs. Defendants had, in fact, submitted contributions to Plaintiffs for these individuals:

a. Edward Dowgiert, Social Security No. 384-14-1295;

b. Norman Surowiec, Social Security No. 278-20-4953;

c. Leonard Szpara, Social Security No. 380-24-6916; and

d. E. Cunningham, Social Security No. 296-01-6153.

These individuals were not included in either the payroll register or the insurance exception listing which Defendants provided to Plaintiffs' audit team. Affiant questioned Mr. Sigler regarding these individuals and was told that contributions were, in fact, due and owing to Plaintiffs for these persons; however, they were not included in the payroll register or insurance exception listing because they were maintained on an "office payroll". Defendants refused to provide any further information regarding these persons and, likewise, refused to provide Plaintiffs with a copy of or access to the "office payroll".

9. On March 28, 1980 Plaintiffs' audit staff was ordered to vacate the premises at approximately 10:00 a.m. Plaintiffs' auditors left shortly thereafter and have not been allowed to return.

Further affiant says not.

(s) Juanito P. Pasia

Subscribed and sworn to before me
this 3rd day of September, 1980.

(s) Susan Elaine Gierak, *Notary Public*,
Wayne County, MI. My commission
expires: 3-19-83.

Appendix H

AFFIDAVIT OF ROBERT E. SIGLER

STATE OF MICHIGAN)
) ss
COUNTY OF MACOMB)

Robert E. Sigler, being first duly sworn deposes and says:

1. I am now, and continuously since March, 1976 have been, the Director of Payroll of each of the above-referenced Defendant companies (hereinafter collectively the "Company"). I have reviewed the Company's Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted and Memorandum in Support. I am personally familiar with the facts stated therein and if called as a witness I can testify from personal knowledge as to those facts, which facts are true to the best of my knowledge information and belief.

2. I am making and filing this Affidavit, both individually and on behalf of the Company and in support of the Company's aforementioned Motion.

3. I am not a member of any union, nor am I an employee of any unit at the Company which is covered by a collective bargaining agreement, which may make me eligible for participation and benefits under the above-referenced Plaintiffs' Trust Funds (hereinafter collectively the "Trust Fund"). Furthermore, approximately sixty (60%) percent of the Company's employees are not members of any union and are not covered by any collective bargaining agreement and, therefore, are not eligible for contributions made to the Trust Fund by the Company.

4. As an employee of the Company I am aware that the Company maintains an employment record in my name. Since the initiation of my employment with the Company I have always considered my employment records confidential and I know that the Company treats those records as confidential. I believe I have a right to keep my employ-

ment records confidential and I particularly object to the Company providing either the Trust Fund on [sic] the Teamsters Union involved with my employment records without my written consent. I will not give my consent in this case.

5. To my knowledge all of the Company's employees' records are treated by the Company as confidential and the Company will not release those records or any portion thereof to any third party without first obtaining written consent of the particular employee or without first being served with an appropriate court order.

6. The Company has offered and continues to offer to provide the Trust Fund with the employment records of its employees covered by the applicable collective bargaining agreement. The Company will also provide the Trust Fund with the appropriate seniority lists, union dues checkoff lists, and employment information on any named individuals on whom the Trust Fund can establish that contributions have been made at any time, provided that the Company can obtain the necessary releases from those individuals.

7. To my knowledge the Company is not delinquent on any covered employees contributions. The Trust Fund has not advised the Company of any such delinquency or deficiency.

FURTHER, DEPONENT SAITH NOT.

(s) Robert E. Sigler, individually

(s) Robert E. Sigler
Director of Payroll of each Defendant Company

STATE OF MICHIGAN)
) ss.
COUNTY OF MACOMB)

On this 19 day of June, 1980 before me, the undersigned, a Notary Public in and for Macomb County, Michigan, personally appeared Robert E. Sigler, to me known, who, being by me first duly sworn, did say that he is the Director of Payroll of each of the companies so listed as Defendants in the above-captioned action, and the individual executing the within and foregoing instrument, and the said instrument was signed on behalf of said companies and by him personally, and that Robert E. Sigler as such acknowledged the execution of said instrument to be a voluntary act indeed by him executed.

(s) Martin F. Gibbons
Notary Public, Wayne County, MI.
Acting in Macomb County, Michigan
My Commission Expires Aug. 21, 1983

Appendix H

SUPPLEMENTAL AFFIDAVIT OF ROBERT E. SIGLER

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Robert E. Sigler, being first duly sworn, deposes and says:

1. I am now, and continuously since March, 1976, have been the Director of Payroll of each of the above-referenced Defendant companies (hereinafter collectively the "Company"). I have reviewed the Company's Answer to Plaintiff's Motion for Partial Summary Judgment or, In the Alternative, Preliminary Injunction and the Memorandum in Support thereof. I am personally familiar with the facts stated therein and if called as a witness am competent to testify from personal knowledge as to those facts, which facts are true to the best of my knowledge, information and belief.

2. I file this Affidavit in conjunction with and supplemental to my earlier Affidavit filed in this matter dated June 19, 1980, and specifically refer the Court to that Affidavit.

3. In my position as the Company's Director of Payroll, I was, and remain to this date, primarily responsible for coordinating the audit with Plaintiffs' auditors, which audit forms the subject matter of the above-referenced action.

4. Immediately prior to the commencement of Plaintiffs' audit, I met with Plaintiffs' auditors at the Company's Sterling Heights, Michigan offices. During that meeting, I detailed for Plaintiffs' auditors the documents which would be presented by the Company, the use made by the Company of each set of documents and the origin and method of preparation of each set of documents.

5. During the course of Plaintiffs' audit, from approximately February 4, 1980 through March 28, 1980, I produced and presented to Plaintiffs' auditors on behalf of the

Company, the employment records on all of the Company's employees covered by the applicable Collective Bargaining Agreements.

6. Each of the above-referenced documents are compiled and maintained by the Company by employee name, by separate company and by separate local.

7. At no time during Plaintiffs' audit, which encompassed approximately two months, did Plaintiffs' auditors request additional documents or dispute the documents which I presented to them.

8. To my knowledge, neither Plaintiffs nor Plaintiffs' auditors have requested "resolvement" by the individual local unions and the company of any questions of "coverage" under the applicable Collective Bargaining Agreements, pursuant to the express language of Article 10 of Plaintiffs' Delinquent Account/Employer Audit manual.

9. I have been informed that Plaintiffs presently demand to review for audit purposes the following records of the Company:

(a) 941 Quarterly Earning Reports;

(b) Insurance Exception Listings for calendar years 1977 through 1979;

(c) Payroll Registers and Payroll Journals;

(d) Specific information regarding four (4) of the Company's employees listed on the office payroll but thought to be covered employees;

(e) Names of all office employees so that Plaintiffs can verify if such employees are actually members of the Union; and

(f) Names of employees who were employed at the Chicago, Illinois location.

10. With the exception of paragraph 9(b) hereinabove, the documents presently requested by Plaintiffs include, by their manner of preparation, confidential information regarding approximately sixty (60%) percent of the Company's employees who are not members of any union, are not "covered" by any Collective Bargaining Agreement and, therefore, are not eligible for contributions to the Trust Fund by the Company.

11. Contrary to paragraphs 4 and 5 of the Affidavit of John P. O'Sullivan submitted by Plaintiffs in Support of their Motion, the Company denies the stated indebtedness to the Plaintiffs' [sic] furthermore a more specific response to these allegations is impossible because Plaintiffs have failed to state specific facts, detail specific individuals, or in any way factually explain these allegations.

FURTHER DEPONENT SAITH NOT.

(s) ROBERT E. SIGLER
Director of Payroll of each
Defendant Company

Appendix H

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

On this ____ day of October, 1980 before me, the undersigned, a Notary Public in and for Macomb County, Michigan, personally appeared Robert E. Sigler, to me known, who by me being first duly sworn, did say that he is the Director of Payroll of each of the companies so listed as Defendants in the above-captioned action, and the individual executing the within and foregoing instrument, and that said instrument was signed on behalf of said companies and that Robert E. Sigler as such acknowledged the execution of said instrument to be a voluntary act and deed by him executed.

(s) MARTIN F. GIBBONS
Notary Public, Wayne County, MI.
Acting in Macomb County, Michigan
My commission expires: Aug. 21, 1983

*All Affidavits are captioned in identical manner.

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Plaintiff,

v.

Civil No. 82-71080

THEUT PRODUCTS, INC.,
a Michigan corporation,
Defendant.

ORDER

This action was filed on behalf of the trustees of the Central States, Southeast and Southwest Areas Pension Fund (Central States), to (1) compel Theut Products, Inc. (Theut), to produce sufficient documents to enable Central States' auditors to verify the accuracy of reporting by Theut and to determine independently that all employees of Theut actually performing bargaining unit work, regardless of union membership, were receiving contributions on their behalf pursuant to operative collective bargaining agreements with various local unions affiliated with the International Brotherhood of Teamsters and in accordance with applicable agreements, and (2) to collect any sums found to be owing (if any) as a result of the audit.

Central States contends that the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001, *et seq.*) (ERISA) requires pension funds to award credited service and grant benefits solely on the basis of actual work performance regardless of whether an employee has made contributions on such employee's behalf and that it is not required to rely on an employer's reports.

Theut takes a contrary position.

Theut's motion to stay proceedings pending a determination by the Court of Appeals for the Sixth Circuit of Central States' right to determine the scope of an audit in a related (though factually distinguishable) case, *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport*, 522 F. Supp. 658 (E.D. Mich. 1981), has been denied. Central States has filed a motion to compel more complete discovery (than that voluntarily agreed to by Theut). Central States relies on Fed. R. Civ. P. 26(b), 34, and 37. Theut's answers to Central States' interrogatories indicate that the discovery of employment-related records of any employees asserted by Theut not to be in the bargaining unit will not be permitted without a court order. Central States has represented that independent verification of reporting accuracy and the constituency of the bargaining unit cannot be effected without access to certain records pertinent to Theut's total workforce. Central States' motion for more complete discovery and Theut's motion for a protective order are before the Court.

The Court has read the pleadings submitted by both parties, and heard oral arguments on September 13, 1982. Theut is to comply with Central States' request for the discovery of the records sought in its interrogatories and in their notice for production of documents subject to the following:

(1) Theut is to make available to Central States' auditors authenticated and detailed copies of IRS 941 forms (as submitted to the Internal Revenue Service) for the years 1977 to the present.

(2) For those years in which the names of the employees of Theut were not required to be submitted on 941 forms, individual earnings records (IRS W-2 forms) are to be made available. (Paragraphs (1) and (2) together will allow the auditors to independently verify the constituency of the complete employee population so that the names (on authenticated documents) can be compared with the fund's

own records based on Theut's monthly reporting forms as well as with those in Theut's payroll registers.)

(3) Complete payroll registers are to be made available subject to the safeguards set forth below. (These registers are necessary in order for the auditors to determine whether a given employee worked during a given week so that contributions would be owed if that employee were performing bargaining unit work. This information cannot be ascertained from 941 or W2 forms).

(4) Central States' auditors are to be permitted access to Theut's records to determine the job status of employees stated by Theut not to belong to the bargaining unit.

(5) Should discrepancies or ambiguities arise with regard to an individual's employment duties, Theut shall make available other data confirming job status such as driver's manifests, trip logs, lease agreements or other items specified in Central States' motion to produce documents.

(6) To protect the confidentiality of employee records: a) any audit is to be conducted at the premises of Theut; b) no employee records are to be copied or reproduced or withdrawn from Theut's premises once the auditors have determined independently that these employees are not performing bargaining unit work.

(7) None of the information obtained shall be transmitted to third parties, such as local unions, without the express consent of Theut.

(8) Review of records of employees not classified by Theut as performing bargaining unit work is limited to independently identifying job classification and eligiblity.

(9) Personnel data relevant to determining employment status shall include information concerning hiring date, lay-off or termination dates (if relevant), position for which applied, and salary. Personal data not relevant to the verifi-

cation of an employee's job classification and actual work performance need not be supplied.

(10) No address of any employee need be supplied. If an address is contained in any of the required documents, such address may be blocked out.

(11) With regard to corporate officers or directors, Theut may block out the individual salaries of such persons on any forms produced (eg. 941 forms, W-2 forms, payroll registers, personnel files). However, documentation authenticating the status of such persons shall be produced.

(12) To the extent that Theut believes any particular item required to be produced under this order is not necessary to reasonably enable Central States to determine whether Theut is accurately reporting Theut may apply to the Court for modification.

SO ORDERED.

(s) AVERN COHN
United States District Judge

DATED: Oct. 21, 1982
Detroit, Michigan

APPENDIX J

SHELDON M. MEIZLISH
Attorney at Law
1166 First National Building
Detroit, Michigan 48226
(313) 964-3430

May 19, 1983

Russell N. Luplow, Esq.
505 Woodward Avenue, Ste. 3400
Bloomfield Hills, Michigan 48013

Re: Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund vs. Central Transport, Inc., et al., C. A. 6, No. 81-1757

Dear Mr. Luplow:

It is my understanding that Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, your clients, will be filing a petition for writ of certiorari.

The Bricklayers Fringe Benefit Funds, Metropolitan Area, et al., as you will recall, filed a memorandum *amici curiae* in support of the petition for rehearing you filed with the U.S. Court of Appeals for the Sixth Circuit.

If and when a petition for writ of certiorari is filed, my clients desire to submit an *amici curiae* brief in support of your petition.

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, I hereby request your consent to submit such brief.

Very truly yours,

Sheldon M. Meizlish

SMM:cf

Appendix J

FEDER & EDES
1527 18th Street, N. W.
Washington, D. C. 20036
(202) 387-1515

David R. Levin June 8, 1983

FEDERAL EXPRESS

Russell N. Luplow, Esquire
Suite 3400
505 Woodward Avenue
Bloomfield Hills, Michigan 48013

Re: *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport, Inc., et al.*

Dear Mr. Luplow:

This firm is counsel to the National Coordinating Committee for Multiemployer Plans, a nonprofit organization consisting of more than one hundred forty multiemployer plans or their sponsors. Because the issues involved in *Central States* v. *Central Transport* are of major importance to NCCMP affiliates, the NCCMP wishes to file an *amicus curiae* brief in support of the petition for certiorari.

Therefore, pursuant to Rule 36 of the Rules of the Supreme Court, I hereby request the consent of the petitioners to the NCCMP's participation as an *amicus curiae* in this case.

Thank you for your cooperation in this matter.

Sincerely,

David R. Levin

DRL/bpa

Appendix J

[ARTHUR YOUNG LETTERHEAD]

June 17, 1983

Russell N. Luplow, Esq.
Russell N. Luplow, P.C.
505 Woodward Avenue
Suite 3400
Bloomfield Hills, MI 48013

Patrick A. Moran, Esq.
Simpson, Moran & Burnett
555 S. Woodward
Birmingham, MI 48011

Re: *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*

Gentlemen:

We have been advised that it is the intention of Central States to file a petition for writ of certiorari in connection with the decision in the above-referenced case. Because of the nature of the issue raised by the Court of Appeals for the Sixth Circuit, and its impact on the ability of independent certified public accounting firms to conduct audits of multiemployer plans as required by applicable federal statutes, we request your consent to our filing a brief amicus curiae in support of the Petition for Certiorari.

If you consent to our filing a brief amicus curiae, please sign the original of this letter and return it to me.

Very truly yours,
(s) Carl D. Liggio
General Counsel

I hereby consent to the filing of a brief *amicus curiae* by Arthur Young & Company in the above captioned case.

(s) Russell N. Luplow

Patrick A. Moran

6241

82-2157

Office - Supreme Court, U.S
FILED
JUL 5 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

No.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI
-AND-
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

31pp

CARL D. LIGGIO
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ARTHUR YOUNG & COMPANY
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Of Counsel
JOHN E. MATSON
Associate General Counsel
PAUL J. OSTLING
Associate General Counsel

BEST AVAILABLE COPY

QUESTION PRESENTED

MAY AN EMPLOYER, WHICH PARTICIPATES IN A MULTIEMPLOYER BENEFIT PLAN, REFUSE TO MAKE AVAILABLE ITS EMPLOYEE RECORDS, INCLUDING RECORDS OF ITS PURPORTEDLY NON-COVERED EMPLOYEES, WHICH IT IS REQUIRED BY STATUTE TO KEEP TO DETERMINE EMPLOYEE BENEFIT PLAN ELIGIBILITY, TO THE INTERNAL AUDITORS OF THAT MULTIEMPLOYER BENEFIT PLAN.

IN THE

Supreme Court of the United States

October Term, 1983

No.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Arthur Young & Company ("Arthur Young") respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari. The consent of counsel for the Petitioners has been obtained. Consent of counsel for the respondents has been requested and refused.

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young is the independent auditor of Petitioner, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund") and also audits numerous employee benefit plans (several of which are multiemployer plans such as Petitioners). These audits permit the plan trustees to comply with the

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 *et seq.*

Most employee benefit plans are required to file with the Department of Labor annual reports which include the plan's financial statements. The annual reports of plans with over 100 participants must include an independent accountant's opinion that the plan's financial statements have been audited in accordance with generally accepted auditing standards ("GAAS"). As is demonstrated in the brief *amicus curiae*, the ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants to audit multiemployer benefit plans in accordance with GAAS.

Congress required independent audits of the financial statements of employee benefit plans (*i.e.*, employee pension and employee welfare plans) to provide, *inter alia*, a level of assurance on the plan's financial statements. Although an independent audit also provides an important control on the administration of a plan,

> [t]he primary objective of a plan's financial statements is to provide financial information that is useful in assessing the plan's present and future ability to pay benefits when due.

FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARD NO. 35 at § 2 (1980).

In 1974 with the passage of ERISA Congress not only mandated an independent audit, but also required defined benefit pension plans to have triennial actuarial valuations. Both the annual audit and triennial actuarial requirements are complementary: to assure that appropriate information is available so that plan participants and others (including regulatory authorities) can evaluate the ability of a plan to pay benefits when due.

When Congress enacted ERISA requiring that all employee benefit funds be audited in accordance with GAAS, 29 U.S.C. §§ 1023, 1024, there was a defined body of professional practice

and literature detailing the audit procedures necessary in multiemployer health and welfare benefit funds and which also provided guidance for the audits of multiemployer plans. These procedures included the testing of employer records. Congress also knew that to conduct a GAAS audit the independent auditor would be required to test the adequacy of the funding of employee benefit plans according to the law and the terms of the plan. To fulfill this goal, the auditor, *inter alia*, performs tests to determine that the proper universe of plan participants has been identified, contributions have been paid by the employer for each plan participant, and that participant benefit entitlements have been properly reflected in the actuarial calculations and related contributions received or receivable. GAAS thus requires not only the testing of the admittedly covered employees, but also testing for improper exclusion of covered employees from the contribution and benefit calculations.

Since benefit eligibility in a multiemployer plan is determined by an individual's employment status and not whether the employer has contributed to the plan, absent such testing or a comparable alternative procedure, it is impossible to determine if all required employer contributions have been made or if the actuarial valuation of a pension plan was correct. Accordingly, one may not be able to determine if a pension plan is underfunded -- a major concern underlying enactment of ERISA, 29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Act of Sept. 26, 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 1208 and the creation of the Pension Benefit Guaranty Corporation, 29 U.S.C. §§ 1301-1309, in 1974. For example, if there was an annual under-reporting of only one half of one percent (.5%) of all participants currently estimated to be members of multiemployer pension plans (over 8,000,000 as of 1978) and the average employer contribution per participant to multiemployer plans were $50 a week (as it is in National Master Freight Agreement at issue in the underlying proceeding), there would be an *annual initial* under-funding of contributions in excess of $100,000,000

(40,000 omitted participants x $2600) for all multiemployer plans. (The compounded lost earnings from these unmade contributions is staggering.) To the extent plan under-funding occurs, the resultant short falls ultimately must be made up either by all employers in the plan (including those who did not under-report their employees) either through increased contributions or increased premium charges by the Pension Benefit Guaranty Corporation. Moreover, to the extent the existence of under-funding cannot be determined, payments imposed upon employers withdrawing from the plan cannot be properly calculated.

Although recognizing a very limited right of access to employer data concerning purportedly non-covered employers, the opinion of the Sixth Circuit has effectively precluded auditors from testing the universe of plan participants in most multiemployer plans thus creating a possible "scope" limitation on the audit. A "scope" limitation *ipso facto* results in a non-GAAS audit and would require the auditors to "qualify" or "disclaim" their opinions on employee benefit plan financial statements. The trustees would then fail to meet the statutory requirements for an audit of the plan financial statements in accordance with GAAS. Congress could not have mandated an audit knowing what it entailed and at the same time denied plan trustees the ability to fulfill that requirement.

In addition to causing a "scope" limitation in the audit, restricting access to employer data by the plan's internal auditors significantly reduces internal control over contributions legitimately due the plan and thus increases the likelihood of error. The inability in a multiemployer plan audit to routinely test whether purportedly non-covered employees are covered is likely to lead to a greater number of failures by employers to report covered employees (and to make the corresponding required contributions) -- either through inadvertent oversight or possibly as a result of intentional under-reporting. The significant deterrent value of the audit tests would then be lost.

Thus *amicus curiae* Arthur Young has a direct interest in the outcome of this proceeding -- not only as it affects (and may

substantially impair) its ability to conduct its audit of the Central States Pension Fund, but also its ability to conduct audits of other multiemployer benefit plans. As a result of the Sixth Circuit opinion, one employer has already refused access of its records to Arthur Young and it is concerned that other employers will do likewise.

WHEREFORE, Arthur Young respectfully moves this Court that leave be granted to it to file the annexed brief *amicus curiae*.

Dated: July 6, 1983

Respectfully submitted,

/s/ CARL D. LIGGIO

Carl D. Liggio
General Counsel
Arthur Young & Company
277 Park Avenue
New York, New York 10172
Telephone: (212) 407-2367

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2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, § 51.03 (4th ed. 1973) 15

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IN THE

Supreme Court of the United States

October Term, 1983

No.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Arthur Young & Company ("Arthur Young") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari and urges that this Court review the judgement and opinion for the United States Court of Appeals for the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983).

The petition for certiorari materially affects the ability of over 2000 multiemployer pension plans with over $50 *billion* in assets and in excess of 8,000,000 plan participants to comply with Congressionally mandated audit (and actuarial) requirements. It

also impacts multiemployer welfare plans. In fact, if the decision of the Sixth Circuit is allowed to stand, the salutory purposes of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD NEWS (94 Stat.) 1208, could be substantially jeopardized.

INTEREST OF AMICUS CURIAE

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young is the independent auditor of Petitioner, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund"), as well as numerous employee benefit plans several of which are multiemployer plans such as Petitioners. These audits permit the plan trustees to comply with ERISA, 29 U.S.C. §§ 1001-1461 (1976 & Supp. V. 1981), and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 (1982) *et seq.*

Most employee benefit plans are required to file with the Department of Labor annual reports which include the plan's financial statements. The annual reports of plans with over 100 participants must include an independent accountant's opinion that the plan financial statements have been audited in accordance with generally accepted auditing standards ("GAAS"). The ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants, such as Arthur Young, to conduct audits of multiemployer employee benefit plans in accordance with GAAS.

Thus *amicus curiae*, Arthur Young, is vitally interested in having this Court resolve the question presented by this Petition:

> May an employer, which participates in a multiemployer benefit plan, refuse to make available its employee records, including records of its purportedly non-covered employees, which it is required by statute to keep to determine employee benefit plan eligibility, to the internal auditors of that multiemployer benefit plan.

THE PROCEEDING BELOW

In complying with their statutory obligations, the joint internal audit staff of Petitioners, Central States Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, both of which are multiemployer benefit plans, sought to examine the employment records of respondents, contributing employers, to ascertain whether respondents had employees who were covered by the plans and for whom funding contributions had not been made by respondents. When respondents refused access to their records, Petitioners obtained an injunction directing respondents to make the necessary records available. 522 F. Supp. 658 (E.D. Mich. 1981). On appeal, the Sixth Circuit reversed, 698 F.2d 802, holding that petitioners had no right to conduct such an audit. 698 F.2d at 806.

SUMMARY OF ARGUMENT

In denying access to the records of purportedly non-covered employees, the Sixth Circuit committed several critical errors:

> (1) it narrowly viewed the trustees' responsibilities and ignored the statutory requirement that the trustees obtain an annual independent audit in accordance with GAAS and a "clean" opinion on the plan's financial statements;
>
> (2) it concluded that as a matter of law no audit of employer records to ascertain plan participants by Petitioners was authorized, but failed to recognize that such an audit is inherently related to the required independent audit of the plan, 698 F.2d at 8′ ›; and
>
> (3) it concluded as a matter of law that an audit of all employer records was "arbitrary and capricious," even though the court conceded that under the plan trust agreements there was a "reasonable cause" standard supported by the "prudent man" standard of ERISA, 29 U.S.C. § 1104(a)(1)(B), allowing at least a limited right of investigation, 698 F.2d at 811.

On the contrary ERISA implicitly authorizes access to all employee records of employers who participate in multiemployer

benefit plans to permit the trustees to meet the statutory reporting requirements and fiduciary obligations of ERISA. By denying even limited access to employer records to determine whether employees were improperly excluded and contributions omitted, the decision of the court of appeals effectively precludes the trustees from fulfilling statutory obligations and makes difficult, if not impossible, an independent audit of the plan. The decision of the court of appeals negates the substantial deterrent effect that the possibility of an audit has and materially increases the possibility that under-funding will result thereby jeopardizing the solvency of employee benefit plans. Finally, it adversely impacts the accurate calculation of fund termination payments upon withdrawal of an employer from the plan.

ARGUMENT

I.

BACKGROUND-MULTIEMPLOYER PLANS

Multiemployer benefit plans are generally industry wide employee benefit plans covering all or some of a participating company's employees, 29 U.S.C. § 1002 (37). They are usually jointly administered by management and labor under a collective bargaining agreement. They provide a variety of benefits such as retirement, health, and welfare benefits.

Covering employees of more than one company, multiemployer plans can include hundreds or even thousands of employers from all over the country, or only a few employers in one area. Plan participants may include both union and nonunion employees. Over 8,000,000 employees in construction, mining, shipping, trucking, food retailing, textiles, and other industries currently participate in over 2000 multiemployer plans[1]--covering approximately 25% of all U.S. workers protected by defined benefit pension plans in the private sector. NATIONAL JOURNAL, June 26, 1982 at 12. A 1980 Department of Labor

1. Multiemployer plans currently control over $50 billion in assets. Lublin, *Law to Protect Multi-Employer Pensions Is Causing Hardship for Many Businesses*, Wall St. J. Mar. 5, 1982 at 40, col. 1.

study estimated that more than 16 million workers will be covered by multiemployer pension plans by the year 2000. 1979-1981 PENS. PLAN GUIDE ANNOT. (CCH) ¶22,877 (OCT. 15, 1980).

Virtually all multiemployer plans require contributions solely from employers. *Id.* For these plans funding is solely dependent on employer contributions and plan eligibility is determined "solely on the basis of service performed for a participating employer, regardless whether that employer . . . has made or defaulted on his required contributions." Advisory Opinion, 31 August 1976, PENS. REP. (BNA), No. 221, Jan. 8, 1979. Accordingly, even if an employer fails to report the employee as a participant and make the required contribution, the multiemployer plan is obligated to pay those benefits when demanded, *see* 29 U.S.C. §§ 1052 and 1053; 29 C.F.R. § 2206-2(a)(1)(2), thus creating an under-funding situation for the plan.

Although multiemployer plans were subject to ERISA, it was the Multiemployer Pension Plan Amendments Act of 1980 (MEPPAA) which directly addressed a growing concern over inadequate funding of these plans. The Pension Benefit Guaranty Corporation (PBGC):

> found that 12 percent of all multiemployer pension plans, covering one-fifth of all multiemployer pension plan participants, are experiencing extreme or significant financial hardship which may result in plan termination. . . . Two percent of all multiemployer plans, with a total unfunded, vested liability of more than $350 million, were found to be experiencing extreme financial hardship and to have a high potential for termination. The remaining 10 percent were deemed to have a significant potential for termination, with a total unfunded vested liability of $3.5 billion.

S. REP. No. 570, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4128, 4129 (footnote omitted). Inadequate funding caused by, *inter alia*, under-reporting and declining work forces in certain industries could lead to billions of dollars in unfunded liabilities, far more than the resources available to the PBGC to cover any failures. PENSION BENEFIT

GUARANTY CORPORATION, *Multiemployer Study Required by P.L. 95-214 (1978)*, Appendix I, Potential Multiemployer Plan Liabilities Under Title IV of ERISA.

II.

CONGRESS DIRECTED THAT MULTIEMPLOYER BENEFIT PLANS HAVE ANNUAL INDEPENDENT AUDITS OF PLAN FINANCIAL STATEMENTS IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS.

A. The Audit Requirement

Congressional concern with employee benefit funds dates back to the enactment of the 1947 Labor Management Relations Act. H.R. REP. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1135, 1173. In 1947, one way Congress sought to protect certain employee benefit funds was by requiring an annual audit of such funds. 29 U.S.C. § 186(c)(5).

The legislative history reveals that the annual audit requirement was intended to put safeguards on the improper and unsuccessful administration of employee benefit funds. Accordingly, Congress decreed that company contributions to employee benefit funds would not constitute an unfair labor practice if such funds were "guarded by certain restrictions, such as that it should be . . . subject to joint control by employer and employees *and by an annual audit* to insure its protection as a trust fund." 93 CONG. REC. 3565 (1947). (Emphasis added).

In 1974 ERISA supplemented existing reporting and disclosure requirements with provisions requiring the reporting of more detailed information concerning the administration of plan assets and the payments of benefits. Moreover, it continued and strengthened the independent audit requirement, 29 U.S.C. § 1023(a)(3)(A), by adding to the arsenal of weapons to protect employee benefit plans already available to the Secretary of Labor the right to hire independent auditors to audit such plans. 29 U.S.C. § 1024(a)(5).

In enacting ERISA Congress was concerned over the adequacy of information available on employee plans. The House Report, evidencing this concern, noted that:

> . . . experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan -- what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time, the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

H. R. REP. No. 533, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4649.

The Senate Report similarly concluded that an opinion of an independent auditor based upon the results of an annual audit would "allow better assessment of the plan's financial soundness by administrators and participants alike." S. REP. No. 127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4864. The Conference Report, recognizing the importance of the audit requirement, specifically noted that "the accountant is to give an opinion as to whether the financial statements of the plan conform with generally accepted accounting principles and the statement is to be based upon an examination in accordance with generally accepted auditing standards." H. CONF. REP. 1280, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5040.

B. What an Audit of a Multiemployer Benefit Plan in Accordance With GAAS Entails

1. *Auditing employer records*

When Congress imposed the audit requirement for employee benefit plans under ERISA, a body of professional literature and practice existed outlining the procedural steps required for audits in general and audits of employee benefit plans in particular. For example, in 1972, the American Institute of Certified Public Accountants had published an Industry Audit Guide, AUDITS OF EMPLOYEE HEALTH AND WELFARE BENEFIT FUNDS, which, although not directly controlling audits of pension plans, summarized audit requirements that had general applicability to pension plans and specific applicability to employee health and welfare funds such as Petitioners Central States, Southeast and Southwest Areas Health & Welfare Fund. The Guide noted that not only its specific requirements apply, but:

> Generally accepted auditing standards apply to audits of an employee health and welfare benefit funds to the same extent they apply to the audits of a commercial enterprise.

AICPA, AUDITS OF EMPLOYEE HEALTH AND WELFARE BENEFIT FUNDS (1972) at 18.

The 1972 Industry Audit Guide reviewed the critical areas of employee health and welfare benefit fund audits. One such area was the audit of employer contributions -- the basic funding vehicle for any benefit plan:

> Contributions
>
> The basic objective in auditing contributions is to determine that amounts due the fund have been received and properly recorded and that employer records and participant records (eligibility or vacation contribution) are being properly maintained.
>
> * * *
>
> The auditing procedures employed should normally include, but are not necessarily limited to, the following:

(1) Total cash receipts shown by the cash receipts book for a selected period should be reconciled to the total amount credited to the general ledger contribution accounts, to the total amount posted to the employer's record, and to deposits shown by the bank statements.

(2) Selected individual employer contribution payments as shown by the cash receipts book should be compared to the amount shown on the employer's contribution report and to the amount posted to the individual employer's contribution record. Selected postings to the employer's record during the test period should be traced to the cash receipts book and to the employer's contribution report.

Id. at 19.

Although these audit procedures were initially directed at the Plan's own records, of necessity, they also had relevance to an employer's records. Accordingly, when the auditor deemed it necessary, direct review of all employer's records was undertaken. Such procedures would include:

Payroll Audits

There may be circumstances in which the independent auditor is engaged to conduct audits of employers' payroll records to determine the propriety of the contributions made. The following paragraphs outline certain procedures which should be considered in the audits of employers selected:

(1) The collective bargaining agreement should be reviewed to determine that the employer has complied with the applicable provisions.

(2) The total gross earnings shown by the employees' earnings records should be reconciled with total wages shown by the general ledger and the payroll tax reports.

(3) Information shown on the employer's contribution reports for a selected number of participants should be compared with the data shown on the employees' earnings

records. In addition, a selected group of participants' earnings records should be compared with the employer's contribution reports to ascertain that they have been properly included or excluded from the reports.

(4) The employer's general cash disbursements book should be reviewed to ascertain whether any payments not recorded as compensation have been made to employees.

(5) For a selected period of time and for a selected group of employees, the data shown in the payroll journal should be compared to the employee earnings records and time records, and the related payroll checks should be examined.

All exceptions to the foregoing tests should be cleared to the independent auditor's satisfaction.

Id. at 20-21.

To verify participants' data, the auditor must be able to test the entire universe of employees (participants and non-participants[2]), to gain assurance that participant records (and related pension plan liabilities) are neither understated nor overstated. As the pre-ERISA auditing literature (and practice) clearly indicated, verification of participation data is an integral part of a benefit plan audit.[3]

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2. The audit literature applicable to all audits provides substantial guidance as to the problem raised by the possible failure to include all participants:

> When planning a particular sample [for a substantive test], the auditor should consider the specific audit objective to be achieved and should determine that the audit procedure, or combination of procedures, to be applied will achieve that objective. The auditor should determine that the population from which he draws the sample is appropriate for the specific audit objective. *For example, an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.*

AICPA, STATEMENT ON AUDITING STANDARDS ("SAS") No. 39 ¶ 17, AU350.17 (Emphasis added.)

3. In recognition of applicable professional standards, Arthur Young's own internal ERISA audit manual provided:

The Guide further prescribed that a disclaimer of opinion on the financial statements of a multiemployer benefit plan would be appropriate when the auditor could not gain assurance as to "the propriety of employer contributions." *Id.* at 29.

Most recently, the AICPA issued a new Audit and Accounting Guide, covering all employee benefit plans, which codifies existing literature and prior practice: AICPA, AUDITS OF EMPLOYEE BENEFIT PLANS (1983). The 1983 Guide expressly recognizes, as had the 1972 Guide, that in "examining the financial statements of a multiemployer plan, the auditor may need to make special arrangements to examine employer records" *Id.* at 56; and concludes, as did the earlier Guide, that "[i]f the auditor is unable to obtain the necessary assurance regarding participants' data, he ordinarily should conclude that it will be necessary to express a qualified opinion or disclaim an opinion because of the limited scope of the examination." *Id.* at 63.

In imposing a GAAS audit requirement, Congress did so in the face of an established body of procedures which contemplated

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The objective of the verification, when necessary, is to ascertain whether the data is complete, primarily that all eligible participants are included and that all relevant data has been provided, and accurate. (Eligible participants include present employees who meet the participation requirements of the plan, terminated employees who have vested benefits, and retired employees or their surviving spouses or other dependents receiving benefits.) Verification procedures usually include:

- Determining benefit eligibility requirements and the statistical data about eligible participants necessary for the actuary to make his computations.
- Testing the completeness and accuracy of the list of eligible employee participants by applying the eligibility requirements to employment records, both for employees on the list and not on the list.
- Testing the accuracy of the statistical data about other eligible participants by reference to employment and payroll records.
- Testing the accuracy of the employment and payroll records from which the data is obtained.

access to and, when needed, an audit of employer records to test plan participation data such as plan membership and contributions.

2. *The use of internal auditors to satisfy GAAS.*

In conducting an audit, not every record of the entity under audit is examined. The independent auditor studies and evaluates a client's internal controls to determine which records will be tested and the degree of reliance which can be placed on those records and the internal controls. AICPA, SAS No. 1, AU320.01. One such internal control is the presence of an effective internal audit function. AICPA, SAS No. 9, AU322. As part of the study and evaluation of internal control, the independent auditor evaluates the work performed by the internal audit function in determining the nature, timing, and extent of its own procedures. AICPA, SAS No. 9, AU322.02.

In the audits of the Central States Pension Plan, Arthur Young not only independently tests plan participation data by directly seeking employer records, but also uses the work of the Central States internal auditors in this area. Thus, the work of the Central States internal auditors, which is at issue here, is an integral part of Arthur Young's statutory audit. 29 U.S.C. § 1023(a). Absent the work of the Central States internal auditors, Arthur Young would have to materially increase its own procedures at increased cost to the Plan or render a "qualified" opinion based on a "scope" limitation in the audit.

C. The Impact of a Qualified Auditor's Opinion

The statute requires a GAAS audit resulting in an opinion by the independent auditor "as to whether the financial statements are presented in accordance with Generally Accepted Accounting Principles." 29 U.S.C. § 1023(a)(3)(A). The Department of Labor has authorized independent auditors to have "scope" limitations in the audit in a very limited category of situations not applicable here. 29 C.F.R. § 2520.103-8. A "qualified" or "disclaimed" opinion resulting from a "scope" limitation relating to

the inability to test plan participation data does not comply with either the Labor Management Relations Act of 1947 or ERISA. Arthur Young has been orally informed by the Department of Labor that in all likelihood the absence of a "clean" opinion caused by a "scope" limitation will be treated as a failure by a plan to comply with the Annual Report filing requirements. *Cf.* 29 C.F.R. §§ 2520.103-1(b)(5)(iv) and 2520.103-2(b)(5)(iv).

III.

CONGRESS INTENDED PLANS TO HAVE ACCESS TO ALL EMPLOYER RECORDS.

A. Access to all employer data was contemplated by Congress in order to satisfy the audit requirement.

One objective of financial statements of employee benefit plans is to permit the assessment of the adequacy of a plan's present and future ability to pay benefits to covered employees. FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARD NO. 35 at ¶ 2 (1980). The Sixth Circuit decision, *Central States* v. *Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983), restricting the scope of an audit only to employer records of concededly covered employees, defeats this objective.

Since multiemployer plans are liable for benefits to eligible employees whether or not a particular employer has made contributions on the employees' behalf, *see* 29 U.S.C. §§ 1052 and 1053, Advisory Opinion, 31 August 1976, PENS. REP. (BNA), No. 221. Jan. 8, 1979, it is important to ascertain whether any plan participants have been omitted and if all required contributions have been made. If access to the "entire universe" (*i.e.*, both admittedly covered and allegedly non-covered employees) of plan participants is denied, no one will be able to assess whether the plan financial statements reflect all benefits likely to be paid and, more importantly, all required contributions to fund those benefits.

It is in this context that Congress required employer record keeping for all employees,[4] not just plan participants, 29 U.S.C. § 1059(a), and imposed penalties on employers who failed to keep such records. 29 U.S.C. § 1059(b). Moreover, Congress imposed on employers reporting obligations based on these record keeping requirements. 29 U.S.C. § 1059(a).

A court imposed "scope" limitation on access to all employer records is likely to create an insurmountable audit problem to discovery of instances of under-reporting and non-reporting for alleged non-covered employees who are in fact covered by and entitled to plan benefits. In fact, to deny access to those records inhibits crucial auditing procedures, violates established standards of auditing practice, and essentially renders the reporting, disclosure, and auditing requirements of ERISA and the Labor Management Relations Act ineffective.

Moreover, when Congress enacted the audit requirements of ERISA and established the foregoing employer record keeping and reporting requirements for *all* employees, existing audit practices included the testing of employer records to determine whether there were unreported employees who were nevertheless entitled to benefits. *Supra* at 8-12. As the record keeping requirement complements the audit requirement by assuring the availability of information to make the necessary evaluations, the two provisions should be read together. To deny access to the very records which Congress has required employers to keep to determine both plan eligibility and the amount of employer contributions while requiring an audit which must examine, *inter alia*, the universe of plan participants, which in turn requires access to those records, creates an internal inconsistency in the statute.

Application of the basic rules of statutory construction further supports the view that the Sixth Circuit decision is contrary to congressional intent and inconsistent with the applicable statute. It is an established tenet of statutory construction that acts of

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4. The definition of employee as set forth in ERISA, 29 U.S.C. § 1002 (6) includes any individual employed by an employer. Thus, ERISA fails to make a distinction between "covered" and "non-covered" employees.

Congress relating to the same subject matter are to be read *in pari materia*. *Weinberger* v. *Hynson, Westcott and Dunning, Inc.* 412 U.S. 609, 631-32 (1973) [separate provisions of a single act should be interpreted to give the Act "the most harmonious, comprehensive meaning possible" in light of the legislative policy and purpose]. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, § 51.03 (4th ed. 1973). This harmony can only be achieved here if 29 U.S.C. § 1059 is read as a grant of authority to a Plan to enable it to fulfill its statutory audit requirement.

Finally, although the Sixth Circuit recognized that there is a "reasonable cause" standard which allows access to employer records, 698 F.2d at 810, it felt it was arbitrary and capricious to "audit" *all* employee records of the employer. *Id.* at 811. This holding failed to consider the statutory requirement placed on the trustees to obtain an independent audit of the plans and obtain an opinion on the plan's financial statements as to whether they were prepared in accordance with generally accepted accounting principles. Since the failure to obtain access to the employer records could result in a non-GAAS audit and a "qualified" or "disclaimed" opinion on the plan's financial statements, it follows that the Sixth Circuit's holding that, as a matter of law, a request for inspection of "non-covered" employee records is "arbitrary and capricious" is, *a fortiori*, incorrect. In fact, failure to seek access to the records may be a failure by the trustees to maintain adequate internal controls which, *inter alia*, could result in a scope limitation in the audit and could well violate the "prudent man" standard found in ERISA, 29 U.S.C. § 1104(a)(1)(B).

B. In order to ascertain funding requirements access to all employer data was contemplated by Congress

Another Congressional concern was the possible draining of fund assets in the future by persons unidentified in the plan records and for whom employer contributions were not made. At the time such under-reporting becomes known, the employer responsible may be neither in business nor a participating employer.

1. *Lack of access to employer data precludes adequate funding determinations required by Congress*

The Multiemployer Act of 1980 significantly changed an employer's funding responsibilities in a multiemployer plan. An employer's obligation to fund benefits is no longer limited to its negotiated contribution plus a modest contingent liability upon withdrawal.

When an employer withdraws completely or partially from a plan, the Act converts what would otherwise be a contingent liability assessed only on plan termination into a present liability for the employer's share of all unfunded vested benefits. 29 U.S.C. §§ 1381 *et. seq.* In three out of the four methods for calculating an employer's withdrawal liability, amounts are reallocated from other employers who have escaped liability. 29 U.S.C. § 1391. (Thus, an employer may become liable for benefits earned by workers who were never in its employ.)

Moreover, to minimize the impact of underfunding, the Multiemployer Act of 1980 also provided that, to the extent multiemployer pension plans were underfunded, all employers in the plan could be assessed to cure the underfunding. 29 U.S.C. § 1421 *et. seq.* If a plan does not meet the funding standards required by the Act, a plan may be placed in reorganization and an employer's contribution may be increased to prevent the plan from terminating. 29 U.S.C. § 1423(b). If a plan terminates, employers may be required to continue to contribute in order to fund the plan's unfunded vested benefits. Thus, the burden for such latent benefits due to under-reporting falls on other employers through increased future contributions to the plan and probably increased insurance premiums to the PBGC.

Unless the total universe of plan participants is identified, the actuarial computations to determine plan funding, 29 U.S.C. §§ 1023(d) and 1393, and withdrawal liabilities, 29 U.S.C. § 1391, are suspect and both an employer's current funding obligations and withdrawal liabilities cannot be determined, let alone accurately determined. Accordingly, access to all employee data to ascertain that all plan participants are reasonably accounted

for and required contributions made is essential to the proper administration of multiemployer plans. Thus, the passage of the Act makes the need for comprehensive audits to permit reliable assessment of funding liability all the more critical.

2. *The PBGC is adversely affected*

In order to insure that payments will be made to all employees entitled to benefits, Congress created an insurance funding mechanism through the PBGC. Employers in single employer plans and multiemployer plans are assessed an "insurance premium" to cover both actual and estimated shortfalls in benefit payments because of underfunded plans. 29 U.S.C. §§ 1301 *et seq.* The PBGC constantly reviews both the financial statements and actuarial reports of pension plans to assess the adequacy of funding. Failure to have reliable information on which to make these critical assessments would impair the ability of the PBGC to effectively fulfill its statutory mandate.

CONCLUSION

If there is a failure to report only one half of one percent (.5%) per year of employees eligible to participate in all multiemployer plans, contributions to multiemployer pension plans will be underfunded at an *initial* rate of over $100,000,000 *per year.* (When the lost compounded earnings that would have been generated by these contributions is taken into account, the amount of the underfunding becomes staggering.) Congress clearly did not intend such a result; in fact, the legislative history shows Congress intended the audit and actuarial functions to be one line of defense against such potential underfunding. The decision of the Sixth Circuit is inconsistent with clearly defined obligations imposed upon both the trustees and independent auditors by Congress. The decision substantially undermines the ability to assess the adequacy of funding of all multiemployer benefit plans and could lead to substantial instances of under-reporting of covered

employees either through inadvertence or design. Thus the deterrent effect of the audit process would be substantially weakened. Finally, the ability to calculate employer plan withdrawal liabilities is adversely impacted.

Wherefore *Amicus Curiae* Arthur Young respectfully requests that this Court grant certiorari to determine this critically important question.

Dated: July 6, 1983

Respectfully submitted,

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APPENDIX

§ 1002. ***Definitions***

For purposes of this subchapter:

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

§ 1023. ***Annual Reports***

(a) (1) (A) An annual report shall be published with respect to every employee benefit plan to which this part applies.

* * *

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include --

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

(3) (A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem

necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b) (3) of this section and the summary material required under section 1024 (b) (3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply.

* * *

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

* * *

(4) (D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) An annual report under this section shall include a financial statement containing the following information:

* * *

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

* * *

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

* * *

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

Actuarial statement

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report if filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination priority categories as set forth in section 1344 of this title, and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

§ 1024. ***Filing and furnishing of information***

(a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

* * *

(5) If the Secretary rejects filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions—

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

§ 1030. ***Alternative methods of compliance***

(a) The Secretary on his own motion or after having received the petition of an administrator may prescribe an alternative

method for satisfying any requirement of this part with respect to any pension plan, or class of pension plans, subject to such requirement if he determines—

(1) that the use of such alternative method is consistent with the purposes of this subchapter and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary,

(2) that the application of such requirement of this part would—

(A) increase the costs to the plan, or

(B) impose unreasonable administrative burdens with respect to the operation of the plan, having regard to the particular characteristics of the plan or the type of plan involved; and

(3) that the application of this part would be adverse to the interests of plan participants in the aggregate.

(b) An alternative method may be prescribed under subsection (a) of this section by regulation or otherwise. If an alternative method is prescribed other than by regulation, the Secretary shall provide notice and an opportunity for interested persons to present their views, and shall publish in the Federal Register the provisions of such alternative method.

§ 1059. ***Recordkeeping and reporting requirements***

(a) (1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.

The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 1053(b)(3)(A) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

* * *

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No. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

MOTION OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., FOR LEAVE TO FILE BRIEF AMICI CURIAE

BRIEF OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., AMICI CURIAE

15 pp

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MOTION OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Bricklayers Fringe Benefit Funds — Metropolitan Area, the Carpenters Fringe Benefit Funds — Detroit and Vicinity, the Cement Masons Fringe Benefit Funds — Detroit and Vicinity, the Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW, and the Laborers Fringe Benefit Funds — Detroit and Vicinity move to intervene in this case as amici curiae for purposes of submitting the attached brief. The consent of the attorney for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

The amici are composite names for trust funds[1] established under, and administered pursuant to, Section 302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1374, as amended, 29 U.S.C. §§1001, *et seq.* In this respect, they have the same legal status as petitioners. Amici operate to provide pension, medical, hospitalization, dental, holiday and vacation pay, optical and other benefits to workers in the construction industry in southeastern Michigan. Each is a multi-employer, jointly administered employee benefit plan created by collective bargaining.

Amici believe that the Sixth Circuit's opinion of January 20, 1983, was, at the very least, overly broad and, by its sweep, will, unless corrected, do serious damage to the public policy favoring protection of employee benefit plans and to the statu-

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[1]The "Bricklayers Fringe Benefit Funds — Metropolitan Area" include the Bricklayers Pension Trust Fund — Metropolitan Area, the Bricklayers and Trowel Trades International Pension Fund, the Bricklayers Holiday Trust Fund — Metropolitan Area, the Detroit and Vicinity Trowel Trades Health and Welfare Fund, and the Bricklayers Joint Apprenticeship Committee.

The "Carpenters Fringe Benefit Funds — Detroit and Vicinity" include the Carpenters Pension Trust Fund — Detroit and Vicinity, the Carpenters Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Carpenters Health and Welfare Fund — Detroit and Vicinity.

The "Cement Masons Fringe Benefit Funds — Detroit and Vicinity" include the Cement Masons Pension Trust Fund — Detroit and Vicinity, the Bricklayers and Trowels Trades International Pension Fund, the Cement Masons Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Detroit and Vicinity Trowel Trades Health and Welfare Fund.

The "Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW" include the Electrical Workers Pension Trust Fund of Local Union #58, IBEW, the Electrical Workers Joint Board of Trustees Vacation Fund, the Electrical Workers Insurance Fund, the Supplemental Unemployment Benefit Fund of the Electrical Industry, Detroit, Michigan, the National Electrical Benefit Fund, and the Joint Apprenticeship Training Trust Fund.

The "Laborers Fringe Benefit Funds — Detroit and Vicinity" include the Laborers Pension Trust Fund — Detroit and Vicinity, the Laborers Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Laborers Metropolitan Detroit Health and Welfare Fund.

tory requirement, in furtherance of that policy, that such plans be properly funded. There are critical policy and practical considerations which amici believe the Court of Appeals either failed to consider or misapprehended. In the interests of the participants for whose sole and exclusive benefit amici exist and the thousands of workers and beneficiaries similarly situated, amici request leave to file the attached brief.

Respectfully submitted,

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BRIEF OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., AMICI CURIAE

Amici, Bricklayers Fringe Benefit Funds — Metropolitan Area, Carpenters Fringe Benefit Funds — Detroit and Vicinity, Cement Masons Fringe Benefit Funds — Detroit and Vicinity, Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW, and Laborers Fringe Benefit Funds — Detroit and Vicinity, are composite names[1] for various employee pension and welfare benefit plans covering workers in the construction industry in southeastern Michigan and, in many respects, their families. All were established under and are administered pursuant to the Labor-Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§1001, *et seq.*

[1]See note 1 in the (attached) Motion of Bricklayers Fringe Benefit Funds — Metropolitan Area, et al., for Leave to File Brief Amici Curiae. The interest of the amici is stated in the motion.

Amici have not made a detailed review of the trial court record in this case. Insofar as the decision of the Court of Appeals for the Sixth Circuit rested on the details of the documents submitted or the particular agreed-upon relationships among the parties, we have no comment to make. It is the breadth of the opinion which concerns us.[2] We are fearful that application of the principles set out there will, at least in the construction industry, frustrate our efforts to conform to the standards of diligence in collecting contributions imposed by statute and regulation.

This brief will be limited to a brief discussion of the matters which we urge need to be given greater consideration, particularly in respect to industries like the construction industry, than they were in the Sixth Circuit's opinion.

1. As a prefatory comment to our discussion, it should be noted that, in reaching its conclusion, the panel drew heavily upon the Eighth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund* v *CRST, Inc.*, 641 F.2d 616 (1981). After the Sixth Circuit's decision in the instant case, the Eighth Circuit, *en banc*, overruled the *CRST* holding, *Robbins* v *Prosser's Moving and Storage Company*, 700 F.2d 433 (Feb. 16, 1983).[3]

Although the narrow issue of the *Robbins* case was whether the trustees of benefit funds were required to exhaust arbitration provisions of a collective bargaining agreement before instituting a collection suit, many of the policy considerations involved in this case were discussed at some length in the Eighth Circuit's *en banc* opinion. In deciding *Robbins*, the Court took cognizance of the Sixth Circuit's opinion in the

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[2]The Sixth Circuit's panel decision in the instant matter appears to be diametrically in conflict with another panel's (unreported) decision. See *Hughes* v *Baker Cement Contractors, Inc.*, C.A. 6, No. 81-3307 (July 6, 1982), reprinted in the appendix to this brief.

[3]The Eighth Circuit stated, "On reflection, however, we believe that [the cited cases including *CRST*] were not correctly decided." 700 F.2d, at 438. See also the entire discussion at p. 438 of the opinion.

instant case. *Robbins*, 700 F.2d, at 445, n. 7 (dissenting opinion).

2. ERISA imposes a fiduciary duty upon trustees of employee benefit plans to collect contributions. One of the earliest interpretative statements concerning ERISA by the Department of Labor or the Internal Revenue Service, the two agencies charged by the statute with enforcement in respect to continuing plans, dealt with this subject. While setting out the conditions under which trustees could agree to installment payment plans of overdue contributions from delinquent employers, the Department of Labor made it plain that such agreements were extensions of credit prohibited by ERISA and that trustees were required to make "systematic, reasonable and diligent efforts to collect delinquent contributions." Prohibited Transaction Exemption 76-1 (March 23, 1976), 41 FR 12740. One of the necessary elements of any systematic effort by multi-employer fringe benefit programs to collect amounts owing — which must, after all, be determined before they can be collected — is the audit.

Typically, multi-employer plans such as petitioners and amici depend upon a system of employer self-disclosure. Weekly or monthly, each employer fills out report forms setting out the names of the employees performing bargaining unit work, hours worked and/or wages earned and such other information as is required for the calculation of contributions due and for the administration of the fringe benefit program. The employer then calculates the contribution due (ordinarily, an amount equal to a percentage of wages or an amount multiplied by the number of hours, days or weeks worked or paid, depending upon the agreed-upon formula) and mails the completed form and a check for the amount shown to be due to the fund office or a depository bank.

The fund ordinarily has no method of independently verifying or challenging the amounts said by the employer to be due. All of the information is in the employer's possession. None is in the fund's.

The fund must, therefore, develop devices intended to disclose potential problem areas or to bring forward information from other sources (e.g., employees, former employees, unions, public information, other employers) which tends either to confirm or to question the information supplied by the employer. Ultimately, however, the proof must come from the employer's own records, which means by audit.[4]

3. For the audit to have any value, the auditor must have available to him all documents required to determine the accuracy of the fringe benefit contribution reports. No one employer record by itself is sufficient to allow the sort of crosschecking the auditor must engage in to make judgments about authenticity and completeness. For example, an employer may record payments to certain employees through the general disbursements book rather than payroll records, or the employer may be misclassifying employees or classifying certain employees as "independent contractors" to evade obligations under the tax laws and/or the collective bargaining agreement.[5] In such situations an audit confined to those records identified by the employer itself as "payroll records of affected employees" would be more likely to conceal than reveal the delinquency.

4. The difficulties are even greater in the kinds of industries which developed multiemployer benefit plans. Small employers or a mixture of large and small employers sharing a pool of workers are characteristic of those industries: trucking, retail trades, garment, maritime, entertainment and construction. Multiemployer plans were created through collective bargain-

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[4]See *Jim McNeff, Inc.* v *Todd*, — U.S. — , 103 S.Ct. 1753, 75 L.Ed.2d 830 (April 27, 1983). In that case, it was an audit which disclosed that the employer owed several thousand dollars in trust fund contributions.

[5]In *Jim McNeff, Inc.* v *Todd*, cited in note 4, *supra*, this Court noted that the employer had submitted reports to the funds containing "the false notation that 'no members of this craft were employed during this month.'" Had the funds in that case been limited in their audit procedures as the Sixth Circuit would limit petitioners in this case, the shortages would never have been found.

ing to provide a means for workers in those industries and their families to achieve a measure of the health and retirement security which workers involved in large single employer plans already had.

Consider the relevant characteristics of the construction industry in which amici operate. Individual carpenters or cement finishers or laborers may work for one or dozens of employers each year. If there is a hiatus in available work at one jobsite because of supply or scheduling problems (not uncommon), the worker may find a short job on another jobsite for the same or a different employer or a different company of the same employer.

The fringe benefit funds will ordinarily have no way of knowing by whom a given participant worker is employed, or even if the worker is employed, until the employer contribution forms are received. The transient nature of employment in the industry[6] is another factor which leaves the funds at the mercy of employer probity and accuracy and requires broad access to records when audits are performed.[7]

5. All of this is further aggravated by the fact that the benefit funds are involuntary creditors and that the debt "has a unique aspect," in that "the party with the responsibility for collection of the debt does not have apparent ability to with-

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[6]See part II of the opinion in *Jim McNeff, Inc.* v *Todd, supra.*

[7]Although the context of the case differs from the instant one, the following language from then District Judge Cornelia Kennedy's (unreported) opinion in *Laborers' Pension Trust Fund — Detroit and Vicinity, et al.*, v *Frank Bizzocchi Cement Construction Company, Inc.*, U.S.D.C., E.D. Mich., Civ. #74-72450 (Oct. 29, 1975), applies here:

> "Many members of the laborers union work for several employers during a given year and work only portions of the year. Thus, the amounts received by any one employee may differ, making it impossible for the union or the funds to secure this information directly from members. Many laborers have limited education and unless they receive the vacation and holiday benefits through their union organization may not know whether they have received the correct amount or not." (Slip Opinion, at 3.)

hold credit." *Laborers' Fringe Benefit Funds — Detroit and Vicinity* v *Northwest Concrete & Construction, Inc.*, U.S.D.C., E.D. Mich., Civ. #78-71765 (June 25, 1979), rev'd on other grounds, 640 F.2d 1350 (C.A. 6, 1981). The trustees have nothing to do with the establishment of the basic contractual arrangement which obligates the employer. They cannot refuse to deal with an employer which has signed the requisite collective bargaining agreement even if they believe that employer to be financially irresponsible. To the extent that credit is extended, they have no voice in the terms of the extension and, unless the collective bargaining agreement or the applicable trust agreement specifically so provide, they cannot make a demand from a given employer for security to assure payment of the obligation, regardless of how impecunious the employer might be. Although the union may have some power to "police" the industry, and its power in the construction industry is often considerably exaggerated, the benefit funds have none.[8]

6. The opinion of the Court of Appeals suggests that there are solutions to some of these difficulties encountered by the trustees. With respect, we believe that the "solutions" are illusory.

A. Contrary to what the court stated, the union and the benefit funds do not necessarily have an identity of interests. One of the principal purposes of the Taft-Hartley requirement of joint union-management administration of such funds was to moderate the level of fund-union identity and ERISA has, of course, made it even clearer that trustees must act for the benefit of the participants, not the unions or the companies. See, e.g., *National Labor Relations Board* v *Amax Coal Company*,

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[8]Even the workers' collective bargaining agent, however, may not insist upon such security as part of a collective bargaining agreement. To do so is an unfair labor practice. *Local 164, Brotherhood of Painters* v *National Labor Relations Board*, 293 F.2d 133 (C.A.D.C., 1961); *Lathers Local 42 and Lathing Contractors Association of Southern California*, 223 NLRB 37 (1976).

453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981), *Hughes* v *Baker Cement Contractors, Inc., supra*,[9], *Robbins*, 700 F.2d, at 439-442, and *Ambromovage* v *Thomas*, 3 EBC 1872, 1878, 1883-1886 (U.S.D.C., M.D., Pa., Civil #8796, July 9, 1982).

B. The "estoppel argument" for subsequently denying benefits to a worker whose employer has cheated, with or without the employee's connivance, can hardly justify the panel's conclusion. First, it is far from certain that this "defense" is available to the funds when an employee sues for benefits. See, e.g., *Robbins*, 700 F.2d, at 441. Thus, to use the Eighth Circuit's expression, the funds are "in danger of being whipsawed". *Ibid.* Second, it fails to take into consideration the inequality of the distribution of power between employer and employee (particularly during hard times). The employer, in clear violation of the agreement, can force an employee as a condition of keeping his job not to complain about the employer's failure to make necessary contributions, a danger of great magnitude when the economy is in a state of recession or depression. Finally, it fails to take into consideration the fact that some employees are too uneducated, either generally or in the mechanisms by which their benefit funds operate, or too unsophisticated to know that they are being cheated.[10]

C. For practical purposes, the recoupment remedy suggested by the Sixth Circuit panel simply does not exist. By the time the cause will have accrued, there is a distinct possibility that the employer will no longer be in business or have sufficient assets to satisfy any judgment. The construction industry is an industry of transient employers as well as transient employees, an industry in addition to which multiple corporate or other forms for a single employer — with all the legal problems of identification and collection that brings — are commonplace. It

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[9]See note 2, *supra*.

[10]See note 7, *supra*.

is also an industry in which undercapitalization of a single employer, known or unknown to its employees, is masked by the endemic division of capital (lender, developer, builder) and the employing unit (contractor, subcontractor). If the employer is still around and collectible when the funds come looking for him, the principal defense the employer will use is, or course, "estoppel".

7. The audit is the most efficacious means of assuring compliance with the fringe benefit provisions of the contract. To the extent the auditor is deprived of the necessary tools, cheating is more likely to go undetected. To the extent it does, the actuarial foundation of the particular fund is threatened, all beneficiaries face a possible loss or diminution of benefits and/or those employers who are fully meeting their fringe benefit funding obligations are placed at a competitive disadvantage in the short run and at risk of having to make up funding shortfalls caused by the cheaters in the long run.

8. Granting the auditor more or less unrestricted access to an employer's books and records may, we recognize, give rise to the possibility of abuse or to a potential invasion of privacy of non-covered employees. Where these are real possibilities and not ruses to justify denial of access to revelatory records, the District Court has ample power to fashion an appropriate protective order.

CONCLUSION

Amici respectfully submit that the Sixth Circuit, focusing too exclusively on the possibilities of abuse and invasions of privacy, failed to give appropriate consideration to the practical and policy difficulties which would be caused by the application of the restrictive principles it enunciated. The focus, we urge, more properly belongs on protecting the participants of employee benefit plans and safeguarding the fiscal integrity of those plans. That court's decision, if allowed to stand, would frustrate that public policy, enunciated in ERISA.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 8, 1983.

APPENDIX

(Unreported) decision of U.S. Court of Appeals
for the Sixth Circuit in
Hughes v *Baker Cement Contractors, Inc.*,
No. 81-3307 (July 6, 1982)

NO. 81-3307
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THURMAN HUGHES, ANTHONY D. LIBERATORE, MARTIN MASON, CHARLES PEARL, RICHARD STANDER, JR., PAUL SWEITZER, DREXEL J. THRASH and RICHARD L. WALLER, TRUSTEES of the OHIO LABORERS' DISTRICT COUNCIL-OHIO CONTRACTORS' ASSOCIATION INSURANCE FUND;

and

W. W. LATHROP, JR., JAMES BYRD, DONALD W. FITTON, JR., FORREST W. HUFF, TOM MOORE, DREXEL J. THRASH, CHARLES McKEE, and JOHN CALDWELL, TRUSTEES of the LABORERS' DISTRICT COUNCIL AND CONTRACTORS' PENSION FUND OF OHIO;

and

W. JOE NIEDHARDT, DREXEL J. THRASH, MARSHALL L. FLYNN, JACK E. KUEBLER, AMOS JACKSON, ROBERT F. BLIEILE, GERALD JONES and WILLIAM COPELAND, TRUSTEES of the OHIO LABORERS' TRAINING AND UPGRADING FUND,

Plaintiffs-Appellants,

vs.

BAKER CEMENT CONTRACTORS, INC.,

Defendant-Appellee.

ORDER

(Filed July 6, 1982)

Before: ENGEL and BROWN, Circuit Judges; and GUY, District Judge.*

*Honorable Ralph B. Guy, Jr., District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

This matter is before this court as a result of plaintiffs' appeal of a summary judgment granted in favor of the defendant in the district court.

Plaintiffs are the Trustees of the Ohio Laborers' District Council-Ohio Contractors' Association Insurance Fund, the Laborers' District Council and Contractors' Pension Fund of Ohio, and the Ohio Laborers' Training and Upgrading Trust Fund. These three funds are collectively bargained, multi-employer, Taft-Hartley fringe benefit funds established by agreements and declarations of trusts between the Labor Relations Division of the Ohio Contractors' Association, the Associated General Contractors of America, Inc., and Employers' Association and the Laborers' District Council of Ohio of the Laborers' International Union of North America, AFL-CIO, an association of a local laborers' union in Ohio.

The defendant is an Ohio corporation engaged in the building and construction industry within the State of Ohio.

On June 1, 1975, defendant became signatory to a collective bargaining agreement that had been negotiated between the Butler County Area Contractors' Association of Hamilton, Ohio, an association of employers, and Laborers' Local No. 534, a local union affiliated with the Ohio Laborers' District Council. This collective bargaining agreement obligated the defendant to make contributions to certain trust funds on behalf of its laborers who work within the geographical jurisdiction of Local 534, whether or not such laborers were in fact union members. Subsequent to entering into this collective bargaining agreement, the defendant, on October 13, 1975, executed another agreement entitled "Assent of Participation," which agreement bound the defendant insofar as trust fund contributions were concerned to the Ohio Laborers' District Council and the local unions of which it is comprised. Pursuant to these two agreements, the defendant made monthly fringe benefit contributions to the trust funds in question on behalf of those members of its work force performing laborers' work. On July 25, 1977,

plaintiff Trustees, pursuant to the relevant contract provisions, requested permission of defendant to perform an audit of its payroll records in accordance with the above-referenced agreements. On November 30, 1977, the audit was commenced but was not completed when the defendant advised the auditor that it would not provide payroll or other related records for employees other than those identified by the *defendant* as laborers on whose behalf a monthly contribution was owed. As a result of this refusal to make the requested records available, the plaintiffs instituted this action against the defendant.

At the final pretrial conference held in the trial court, the parties were directed by the district judge to present this matter on cross-motions for summary judgment rather than by way of trial. Pursuant to this direction, cross-motions for summary judgment were filed and, on April 21, 1981, the district judge entered an order of summary judgment essentially finding in favor of the defendant.

Plaintiffs, defendant, and the trial court were all in agreement that the plaintiffs are entitled to review such records as are necessary to fulfill their obligations under the collective bargaining agreement and the trust fund agreements. By implication at least, the parties are also in agreement that sufficient information was not furnished by the defendant to the plaintiffs in order for them to make a complete determination as to whether fringe benefit funds are being contributed by the defendant as required. The district court held, however, that the release of all the information requested by the plaintiffs would necessarily require the disclosure of additional information which was not needed by the plaintiffs and which the court deemed confidential in nature insofar as the employer was concerned. The trial court further concluded that the information that the Trustees needed was available from another source, i.e., the Union, and that therefore the missing information that they needed to complete their audit could be obtained by resorting to the Union and its records.

Although this appeal poses interesting questions which are being raised with increasing frequency as a result of the passage of the Employees' Retirement Income Security Act of 1974 (ERISA), this court concludes that it is unnecessary to reach those questions in order to determine this appeal. The decision of the trial court that the plaintiffs were entitled to the type of information that they sought in this lawsuit but could obtain it from other sources is erroneous and not supported by the record.

The trial court recognized that plaintiffs should not be wholly dependent upon the defendant's identification of who was working as a laborer and thus entitled to fringe benefit fund contributions. The court concluded, however, that because there was a Union security agreement in the collective bargaining agreement requiring all laborers to be Union members and, further, because the collective bargaining agreement provided for union stewards to be at each job site, that the Union would thus be able to definitively ascertain and identify those employees performing laborers' work on whose behalf contributions had to be made. This conclusion is fatally defective for two reasons.

First, defendant's collective bargaining agreement with Local 534 contained a "grandfather clause" which required that only those laborers hired after the effective date of the agreement, June 1, 1975, become members of Local 534. Thus, the defendant could have non-Union laborers on its payroll without being in violation of its agreement with Local 534.

Second, although the Assent of Participation agreement signed by the defendant also obligated it to make trust fund contributions in the geographic areas covered by Locals 423, 410, and 265, the defendant was not in fact signatory to any collective bargaining agreements with these other three unions. Thus, although the standard collective bargaining agreements of Locals 423, 410, and 265 contained "union security clauses," they were not binding upon the defendant because it had no

direct contractual relationship with these unions. Thus, the defendant could perform work in the geographic areas of these unions and use non-union labor. These two examples clearly demonstrate that there were at least two groups of employees of indefinite size for whom the employer was required to make trust fund contributions but whose eligibility for same could not be determined from Union records.

In addition, undue emphasis is placed upon the fact that in the geographic area under the jurisdiction of Local 534 there was to be a union steward on the job. One of the significant purposes achieved by the passage of ERISA was to set up independent trust funds and trustees with fiduciary responsibilities. This was for the purpose of protecting the employee against both management and the union. To suggest that the union steward is the ultimate safeguard as to who is doing laborers' work overlooks the fact that Congress, by the passage of ERISA, legislatively determined that employee retirement income and fringe benefits should not be left to the protection solely of management or union, but required the protection of an independent board of trustees.

Since the major premises on which the trial court determined that the plaintiffs could in fact achieve access to the information they needed are incorrect, it is necessary to reverse the summary judgment by the district court and remand for such further proceedings as will enable the plaintiffs to secure the information necessary for them to meet their fiduciary responsibilities under ERISA.

By way of further guidance to the parties on remand, this court would further note that it would not appear that a referral of this matter to arbitration is an appropriate vehicle for the resolution of this dispute at its current level. It may be that ultimately the parties will have a disagreement as to whether a given employee is performing laborers' work. Such a determination may or may not be properly referrable to arbitration based upon the provisions of the particular bar-

gaining agreements involved, but arbitration is not an appropriate vehicle for determining the nature and scope of the records to which plaintiffs should have access. The court would further note that the case of *Central States, Southeast and Southwest Areas Pension Fund* v *C.R.S.T., Inc.*, 641 F2.d 618 (8th Cir. 1981), appears to be distinguishable from the case at bar on its facts.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

6495

MOTION FILED
JUL 26 1983

No. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AND BRIEF AS AMICUS CURIAE

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the

petition for Writ of Certiorari. Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF THE NCCMP

Multiemployer plans are created and funded pursuant to collective bargaining agreements and such plans receive contributions from more than one employer. The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA")[1] to participate in the development of employee benefit legislation and government regulations under ERISA and other laws affecting multiemployer plans. More than 140 multiemployer plans and related international unions (but not the particular unions or plans involved in this case) are affiliated with the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than eight million workers. The decision below has far-reaching consequences for all multiemployer plans and, therefore, is particularly adverse for the NCCMP affiliates, which represent the vast majority of participants in such plans, for the reasons set forth in the accompanying brief.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical implications of the decision below for multiemployer plans and to state the position of the trustees, participants, and beneficiaries of such plans. In

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[1] ERISA was substantially amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 P.L. 96-364, 94 Stat. 1208 (1980).

fact, the NCCMP has recently participated as an *amicus curiae* in both *McNeff v. Todd*, ____ U.S. ____, 51 U.S.L.W. 4497 (1983) and *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982).

The NCCMP urges this Court to issue a Writ of Certiorari in the instant case. The NCCMP's concern is that refusal of this Court to review the judgment below—that trustees can no longer independently ascertain the identity of their plan participants, but must delegate this fiduciary duty to adversely interested parties over whom the trustees have no control—will have broad, adverse consequences upon the financial soundness of its affiliated employee benefit plans and, therefore, upon the plans' ability to provide benefits.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE NCCMP

The NCCMP brief focuses on issues which it believes may not be adequately presented elsewhere, including:

(a) the particularly adverse impact that the court's holding below will have on national employee benefit policy and the multitude of multiemployer plans represented by the NCCMP; and

(b) the fundamental conflict between decisions of this Court, as well as those in other federal circuits, and the decision of the court below.

The NCCMP, therefore, moves for leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

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Dated: July 26, 1983

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief as *amicus curiae* to urge this Court to review the holding below that multiemployer plan trustees may not conduct an audit of pertinent payroll records

of all employees of a participating employer in order to determine whether the employer is fulfilling its legal obligation to make contributions on behalf of, and in the proper amount for, participants in a multiemployer plan.

I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth in this brief, the NCCMP submits that the decision below offends the national employee benefits policy established by Congress and recognized by this Court and, therefore, will have a significant adverse effect upon the nation's multiemployer plans and the retirement security of more than eight million participants and beneficiaries.

The NCCMP is concerned that the refusal of this Court to review the lower court's decision may undermine both the independence and neutrality of multiemployer plan trustees and the financial integrity of such plans. Trustees would no longer be able to determine on an ongoing basis whether employer contributions were being made on behalf of covered employees. Only after an employee applied for benefits or requested an accounting of trust assets would the trustees be able to determine whether the employee was an eligible participant to whom such financial disclosure must be made and whether contributions should have been made on his/her behalf. Trustee failure to make an accurate accounting of plan assets, including contributions due, to plan participants and to the federal government subjects the trustees to statutory sanctions. Trustee failure to attempt to collect contributions constitutes a prohibited transaction, actionable under ERISA. The lower court's ruling, by emasculating the authority of trustees, threatens the very foundation of multiemployer plans – their financial base.

II. THE NATURE OF MULTIEMPLOYER PLANS

The multiemployer plan involved in this proceeding and the typical plan affiliated with the NCCMP have many characteristics in common. They are established and maintained pursuant to the collective bargaining process, and they cover workers in broad geographical areas. These plans, too, are subject to legal constraints in three respects important to the issues raised by the lower court's ruling:

(i) all employees covered by the relevant provisions of the applicable collective bargaining agreements are also covered by the plan, subject only to the limits of the plan's eligibility requirements;

(ii) contributing employers must make payments on behalf of all their covered employees; and

(iii) benefits from pension plans must be paid by the plan to covered employees whether or not the requisite employer contributions have been made to the plan.

These legal obligations serve to assure that the maximum number of eligible employees receive from a properly funded plan the benefits for which they labored.

A financially sound plan, and one operating within the confines of law, requires a proper actuarial relationship between employer contributions and employee benefits. The necessary predicate to maintaining the legally mandated financial integrity of pension plans is the implementation of an ongoing system to monitor plan assets – including plan contributions – and plan liabilities, *i.e.*, identifying how much and to whom benefits will be paid.

Employer desires to minimize expenses, including payments to employee plans, are in constant tension with plan needs to maximize the collection of contributions. Therefore, it is the typical practice of trustees of plans, like those in this proceeding and those affiliated with the NCCMP, to establish strict

auditing procedures which ensure employer compliance with both plan and statutory reporting and contribution provisions. It has been the experience of the NCCMP affiliates that two discrete types of monitoring procedures are generally conducted: delinquency audits and systematic audits.[1] Delinquency audits are the result of known or suspected failures or refusals of employers to properly report or contribute. On the other hand, systematic audits are conducted because trustees have garnered extensive experience in administering plans and know that occasional spot-checking of employers' records is the only reasonable method of ensuring that what is essentially an honor system of employer self-reporting in fact remains honest.

It cannot be said that a procedure for systematic audits is created out of overabundant caution or needless worry. Manifest and reasonable cause for trustees to systematically audit employers is amply demonstrated by the countless litigated cases in which employers have sought to deny or evade their obligations to contribute on behalf of any or all of their employees. Moreover, this legion of cases in part stimulated the deep Congressional concern that resulted in the passage of the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, 94 Stat. 1208 (1980), wherein the Congress expressed its intent to simplify and expedite the collection of unpaid contributions by multiemployer plan trustees. *See*, 29 U.S.C. § 1145; *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 92-99 (Brennan, J., dissenting) (1980). The instant case is quite simply a frustration of that Congressional intent.

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[1] The court below refers to systematic audits as "random audits." However, the process of selecting the target for such an audit is not "random" in the statistical sense. Rather, once the determination is made to conduct systematic audits, the selection process is the result of a considered decision by plan trustees to audit, for example, employers in one segment of an industry, or employers in a particular location, or employers over a certain size.

III. SUMMARY OF REASONS FOR REVIEW

1. Consistent with established Congressional policy, this Court has declared that employee benefit plan trustees have an absolute duty of loyalty to plan beneficiaries and the exclusive authority to control plan administration. *See, NLRB v. Amax Coal,* 453 U.S. 322, 329-333 (1981). To fulfill these responsibilities, this Court has consistently recognized the right of those trustees to calculate and collect employer contributions due the employee benefit funds. *See, McNeff v. Todd,* ____ U.S. ____, 51 U.S.L.W. 4497 (1983); *NLRB v. Amax Coal, supra; Lewis v. Benedict Coal Corp.,* 361 U.S 459 (1960); *United States v. Carter,* 353 U.S. 210 (1957). The independent right of trustees to ascertain the identity of trust participants and beneficiaries is a fundamental prerequisite to the discharge of all fiduciary duties found at common law; all such duties which are detailed in the Employee Retirement Income Security Act ("ERISA"); and those fiduciary duties which have been interpreted by the federal judiciary. *Accord, McNeff v. Todd,* ____ U.S. ____, *supra; Chicago M. & St. P.R. Co. v. Des Moines U.R. Co.,* 254 U.S. 196, 208 (1920); 2 *Scott on Trusts,* §§ 170, 171 (3d ed. 1967). Yet, contrary to these fundamental principles, the Court below denied the trustees the independent right to conduct an audit of the pertinent records of all the employer's employees in order to verify on whose behalf and in what amount an employer must contribute.

Additionally, the funding of employee benefit plans, like the federal income tax structure, is based on a system of self-reporting. Systematic audits are the keystone of financial integrity in both instances. Therefore, in order to satisfy their fiduciary duties, trustees must continue to attempt to conduct such audits, because they are the most effective and reasonable means of protecting the interests of the millions of workers who will look to these trusts for benefits. Hence, the limitations on trustees imposed by the court below create a recurring problem for those who administer multiemployer plans.

2. The lower court, straining logic and ignoring economic reality, delegated to the employer the trustees' duty of identifying actual and potential trust beneficiaries by limiting the scope of the trustees' audit only to those employees whom the employer asserted were entitled to the benefits of the plan. This delegation of trustee authority is contrary to the reasoning of this Court in *NLRB v. Amax Coal, supra*, and *McNeff v. Todd, supra;* it is contrary to the express dictates of ERISA, *see*, 29 U.S.C. §§ 1103, 1104, 1106, 1110; and it stands in direct conflict with decisions in the federal circuits, including the Sixth, interpreting the duties of trustees. *See, Rosen v. Hotel & Restaurant Emp., Etc.*, 637 F.2d 592, 600 (3d Cir. 1981); *Nichols v. Trustees of Asbestos Workers Pension Plan*, 3 EBC 1726 (D.D.C. 1982); *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977); *Van Gunten v. Central States, Etc.*, 672 F.2d 586 (6th Cir. 1982).

Absent a uniform rule enunciated by this Court, trustees will be whipsawed between the denigration of their authority by the court below and the ultimate responsibilities imposed on them in all the circuits, including the Sixth. *See, Van Gunten v. Central States, Etc., supra.*[2]

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[2]Ironically, the Sixth Circuit recently held in *Van Gunten v. Central States, Etc., supra*, that the pension plan, which is the subject of the instant case, must pay benefits to a participant even though an employer had failed to make the requisite contributions on behalf of that participant. This case is discussed, *infra*, at 15.

IV. REASONS FOR REVIEW

1. Multiemployer plan trustees must have an independent right to ascertain the identity of trust beneficiaries by means of systematic audits.

A.

This Court long ago held that in order to create a trust there must be reasonable certainty as to the purpose, the property, and the beneficiaries. *Chicago M. & St. P.R. Co. v. Des Moines U.R. Co.*, 254 U.S. 196, 208 (1920). The purpose of multiemployer benefits trusts and the policy underlying the statute which regulates those trusts are one and the same: to protect the interests of participants and to ensure the receipt of promised benefits. *See*, 29 U.S.C. §§ 186(c)(5), 1001(b).

The property of such employee benefit trust consists initially of employer contributions, which employers have a statutory obligation to pay. 26 U.S.C. § 412 and 29 U.S.C. §§ 1082, 1145. Moreover, ERISA "vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone, and not the employer or the union. 29 U.S.C. § 1103(a)." *NLRB v. Amax Coal*, 453 U.S. 322, 333 (1981). The beneficiaries of these trusts are employees who satisfy plan eligibility requirements.

B.

With respect to multiemployer pension plans there is no question but that trustees make the initial determination of whether an employee is a beneficiary at that point in time when the employee retires and applies for a pension. Furthermore, the fact that an employer has wrongfully failed to make contributions on behalf of an employee-beneficiary has been held not to form the basis for trustee refusal to pay the benefit, because the entitlement and amount of the pension is a function of hours worked, not hours worked for which contributions were paid. *See, Van Gunten v. Central States, Etc., supra.* Therefore, the

trustees, upon whom Congress has imposed a fiduciary duty to maintan the financial integrity of the trust, must have an ongoing mechanism to determine on which employees' behalf and in what amounts employers must make contributions. *See, NLRB v. Amax Coal, supra,* 453 U.S. at 336-337; *Adams v. N.J. Brewery Emp. Pen. Trust Fund, Etc.*, 670 F.2d 387, 397 (3d Cir. 1982); *Rosen v. Hotel and Restaurant Emp. Etc., supra*, 637 F.2d at 600. Anything less than a comprehensive system for monitoring, recording and crediting contributions with accuracy would not be what "a prudent man acting in a like capacity and familiar with such matters" would do. 29 U.S.C. § 1104(a)(1)(B). *See, Nedd v. United Mine Workers of America, supra; Nichols v. Trustees of Asbestos Workers Pension Plan, supra.*

Nonetheless, the court below denied the trustees the right to conduct a systematic audit of pertinent records of all the employer's employees in order to ascertain whether the employer was properly reporting and contributing on behalf of all eligible employees. The court left the trustees at the mercy of employers by holding that an employer was entitled to limit the scope of the audit to the pertinent records of employees, who the employer – and only the employer – asserted were covered by the plan. Thus, the more egregious the employer's failure to report to the trust on behalf of eligible employees, the more limited the scope of the audit.

The danger of such a situation is illustrated in the case of *McNeff v. Todd, supra*, where this Court found an employer obligated to contribute on behalf of employees pursuant to a valid prehire agreement, and where the employer had consistently reported that it had no covered employees. It was precisely because of a plan audit that the trustees were able to verify that certain employees were in fact participants in the trust on whose behalf contributions were legally required. Yet, under the holding in the instant case, the trustees in *McNeff v. Todd* could not have conducted such an audit, because the employer asserted that none of its workers were covered

employees. Therefore, although this Court has held that employers must contribute and trustees must collect those contributions, the decision below blindfolds the trustees in the performance of their legal duty.

C.

The court below failed to appreciate that the funding of multiemployer plans, like the federal income tax structure, is based on a system of self-reporting and that "it would be naive to ignore the reality that some persons attempt to outwit the system. . . ." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). Just as the tax investigatory system of audits prevents the dishonest and erring from escaping taxation and shifting heavier burdens to honest taxpayers, so, too, does a pension fund's audit program prevent employers from avoiding their contribution obligation, thereby diluting the financial stability of the trust and shifting the burden to complying employers. Monitoring compliance by systematic audits in both situations has long been found to be reasonable, prudent, and the most effective tool for monitoring fiscal integrity. *Accord, United States v. Bisceglia, supra; Donaldson v. U.S,* 400 U.S. 517 (1971)

D.

The court below held out to the trustees the possibility of broadening the scope of the audit to include the records of particular employees who the trustees have reasonable cause to believe should have been reported by the employer. Though characterized as a "reasonable cause" requirement, the detail and particularity which the court below required of the trustees in reality subjects them to the same kind of "probable cause" standard that this Court has rejected in analogous situations — rejected because the requirement would compel litigation on the very subject of the inquiry. *See, United States v. Powell,* 379 U.S. 48, 54 (1964) (upholding the scope of an Internal Revenue Service investigation); *United States v. Morton Salt Co.,* 338

U.S. 632, 642-643 (1950) (recognizing the broad scope of inquiry by the Federal Trade Commission); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 216 (1946) (enforcing the subpoena power under the Fair Labor Standards Act).

The court below erroneously held that this "reasonable cause" standard must be imposed on the trustees because the scope of investigations by the Secretary of Labor into suspected or known violations of ERISA are expressly subject to such a standard. *See*, 29 U.S.C. § 1134(a). The court read more into the statutory language than in fact is there. The Secretary can

> . . . make an investigation, and in connection therewith to require the submission of reports, books and records, and the filing of data in support of any information required to be filed with the Secretary under this title. . .

29 U.S.C. § 1134(a)(1), without any express requirement of reasonable cause.[3] Moreover, the Secretary may make an on-site review of such records, without any express requirement of reasonable cause, if that entry is made pursuant to an agreement. 29 U.S.C. § 1134(a)(2). The Secretary must satisfy an express reasonable cause standard only if on-site review is requested by the Secretary, but not agreed to by the subject of the review. 29 U.S.C. § 1134(a)(2). In the instant case there is no doubt that the employer agreed to an on-site audit by the trustees. Therefore, if the lower court's analogy to the role of the Secretary is properly drawn, the trustees do not need reasonable cause, because they have an agreement to conduct an on-site audit. Reasonable cause defines the limits of the entry into the workplace, not the scope of the audit. Even if the statute were not absolutely clear, the lower court's reading of the provision is inconsistent with this Court's interpretation of similar investigatory provisions. *Accord, Marshall v. Barlow's, Inc.*, 429 U.S. 1347 (1977).

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[3]Recently, the Sixth Circuit broadly interpreted the scope of information subject to this statutory provision. *See, United States v. S & Vee Cartage Co., Inc.*, ____ F.2d ____, 4 EBC 1361, 1364 (6th Cir. 1983).

E.

ERISA imposes on fund trustees the obligation to comply with detailed minimum standards governing participation, funding, vesting, reporting, and disclosure. Concomitantly, the statute establishes corresponding stringent penalties for failing to satisfy those obligations. The court below, by intruding upon the day-to-day administration of trusts and limiting the independent authority of those involved in that administration, exposes trustees to the imposition of substantial civil and criminal penalties for failure to discharge their duties. *See,* 18 U.S.C. § 1027, 29 U.S.C. § 1132. Chief among those duties is that of unwavering and absolute loyalty to fund participants, *NLRB v. Amax Coal, supra;* yet the court below has denied the trustees the independent means to verify to whom that loyalty is owed.

This Court long ago held and ERISA now states that to assure that the trustee has exercised prudence in the collection and management of trust assets, beneficiaries must be given a complete accounting by the trustee. *Dillman v. Hastings,* 144 U.S. 136 (1892); 29 U.S.C. §§ 1024, 1025. Additionally, the trustee must annually provide the federal government with highly detailed financial information concerning the assets and liabilities of the trust and the number of participants, 29 U.S.C. §§ 1024, 1307. Clearly, no accurate reporting and disclosure can be made if the trustees cannot independently identify the beneficiaries – the necessary predicate to determining the trust's liability for accrued pension benefits – and the trust assets, which include the appropriate employer contributions.

F.

The court below simply misunderstood the purpose of a systematic audit: to inquire whether the employer's reporting is accurate, not to accuse the employer of inaccuracies. "It would seem elementary that no meaningful investigation . . . could be conducted if the identity of the persons involved must first be ascertained," *United States v. Bisceglia, supra,* 420 U.S. at 150, but so the court below held.

For years, trustees have relied upon audits as the most expeditious and reasonable means to verify the accuracy of their trust accounts. The legislative history of ERISA indicates that Congress refrained from delineating an exclusive and discrete list of powers and duties of fiduciaries. Hence, Congress did not dictate to the trustees the type of mechanism necessary to assure accurate accounting of employer contributions. Rather Congress intended that fiduciary conduct be governed by principles applicable to the common law of trusts, *see,* 3 *United States Code and Administrative News*, 1974, at 4639, 5186, thereby sanctioning trustees' use of audits – a traditional means of protecting and preserving trust assets. Moreover, Congress, desirous of the continued maintenance and financial integrity of multiemployer plans, recently enacted legislation to protect those plans and place further duties upon their trustees to collect employer contributions. Multiemployer Pension Plan Amendments Act of 1980, P. L. 96-364, 94 Stat. 1208 (1980). This Court has recognized and adhered to that Congressional intent. *See, McNeff v. Todd, supra; Robinson v. UMW*, 455 U.S. 562 (1982); *NLRB v. Amax Coal, supra.* However, the holding below runs afoul of that Congressional purpose and subverts the reasoning of this Court.

The Congress went to great lengths to make clear its reasons for recently amending ERISA.

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case . . . Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

* * *

> The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provisions be made to discourage and simplify delinquency collection.

126 *Cong. Rec.* H7899 (daily ed. August 26, 1980). *See, Amax Coal, supra*, 453 U.S. at 338, n. 22.

The necessary predicate to any such delinquency action must be an audit. In fact, as discussed above, it is all but impossible for trustees to satisfy their obligations under the statute with respect to collection of contributions if the trustees are not given a free hand to determine whether employers are making proper contributions. The decision by the lower court has left the trustees collection role to the whimsy of employers. Essentially, the greater the employers' failure to report covered employees, the more restricted is the trustees' ability to monitor those failures.

Congress has mandated that collection actions not be mired in the judicial process; it follows, *a fortiori*, that the necessary prerequisite to the trustees' determining whether such an action should be brought – a complete audit of the pertinent records of all employees – must not itself become the subject of endless litigation.

2. The statutory mandate that trustees remain neutral and act for the exclusive benefit of trust beneficiaries would be materially compromised if trustees were required to delegate the determination of employee eligibility to adversely interested parties over whom the trustees have no control.

A.

Trustees and their benefit funds are to be independent of employer and union control. *NLRB v. Amax Coal, supra; Bugher v. Consolidated X-Ray*, 705 F.2d 1426 (5th Cir. 1983). Moreover, ERISA was designed to reinforce, not to reduce that

independence, by generally prohibiting trustees from delegating their fiduciary responsibilities. *See*, 29 U.S.C. §§ 1105, 1110. As discussed above, the underpinnings of all fiduciary duties is the loyalty the trustees owe to the trust beneficiaries. The trustees' ultimate concern is the relationship between the beneficiaries and the fund. *NLRB v. Amax Coal, supra*, 453 U.S. at 337-338.

Multiemployer plans, like the one in the instant case, often extend coverage over wide geographical areas. Multiemployer plan participants do not choose their employer on the basis of the federal judicial circuit in which that employer does business. The duties and obligations of the trustees of these plans must, therefore, be uniform throughout the circuits. This need for consistency is also reflected in the express Congressional directive that the United States courts fashion a federal common law of pensions to fill the statutory interstices extant in ERISA. *See, Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, ____ U.S. ____, 51 U.S.L.W. 4945, 4951, (1983); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 663 (9th Cir. 1981); *Wayne Chemical Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 322 (N.D. Ind.) *aff'd as modified*, 567 F.2d 692 (7th Cir. 1977).

B.

The holding below – which essentially delegates the trustees' duty to verify the identity of plan participants to the employer, the union, the employees themselves, or the Department of Labor – is inconsistent with decisions in the Sixth and other federal circuits, clearly erroneous under ERISA, and patently absurd. The dilemma forced upon trustees by the inconsistency of the holding below is illustrated by comparing that decision to three other recent decisions. In *Rosen v. Hotel and Restaurant Emp., Etc., supra*, the court held that the trustees had an affirmative duty to notify a participant if contributions were not being made on his/her behalf; a duty to take action against the employer for failure or refusal to contribute; and an obligation

to pay benefits to an eligible employee, even if his/her employer had failed to make the appropriate contributions. The court recognized that although the union owes a duty of fair representation to its members, "it does not control, nor is it in a position to oversee, the employer's contributions to the Fund. *United States v. Santiago,* 528 F.2d 1130, 1133 (2d Cir. 1976), *cert. denied,* 425 U.S. 972 (1976)." *Id.,* 637 F.2d at 599, n. 10. *See, Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433 (8th Cir. *en banc* 1983). The *Rosen* decision stands in stark contrast to the delegation of trustee authority mandated in the decision below.

Consistent with the decision in *Rosen*, the Sixth Circuit held last year in *Van Gunten v. Central States, supra,* that trustees could not deny pension benefits to an employee because the employer had failed to make contributions. In addition to the obligation to pay benefits for which an employee labored, Congress imposed upon trustees a fiduciary duty to maintain the financial integrity of employee benefit trusts. However, the decision below, when read in conjunction with the *Rosen* and *Van Gunten* decisions, gives the trustees no independent mechanism to monitor the payment of monies into the trust, while at the same time requiring them to make payments out of the trust.

Moreover, in *Nichols v. Trustees of Asbestos Workers Pension Plan,* 3 EBC 1726 (D.D.C. 1982), the court held that not only were fiduciary duties nondelegable, but also that it is clearly the nondelegable duty of trustees to determine what is owed the plan. That court relied on, *inter alia,* the Third Circuit's decision in *Rosen:*

> [I]t is the duty of the Trustees to determine what is owed to the Plan in . . . contributions for the years in question, to attempt to collect this sum, and to create a system by which future . . . contributions may be monitored, recorded and credited with accuracy. Anything less would not be what 'a prudent man acting in a like capacity and familiar with such matters'

> would do. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). How the Trustees fulfill this duty is left to the discretion of the Trustees themselves; the Court, in its limited role in the administration of pension trusts, may only order them to do so. *See, e.g., Johnson v. Botica*, 537 F.2d 930, 937-38 (7th Cir. 1976); *Pete v. United Mine Workers*, 517 F.2d 1275, 1286 (D.C. Cir. 1975).

Nichols v. Trustees of Asbestos Workers Pension Plan, supra, 3 EBC at 1732.

If the ruling of the court below is permitted to stand, trustees administering plans that span these federal circuits will have no choice but to risk breaching a fiduciary duty in one jurisdiction due to a diminution of their authority in another. Moreover, to the extent that the applicable federal agencies determine that the failure to collect employer contributions has jeopardized the financial integrity of a fund, trustees can be certain that these agencies will take action against them even in the face of the fact that the court below has made it virtually impossible for trustees to audit an employer and thereby find delinquent contributions owing to the fund. *See*, 29 U.S.C. § 1134.

C.

Although the lower court held that the trustees could rely on the Department of Labor to ascertain the identity of participants, reality belies such reliance. The Department of Labor *Pension and Welfare Benefit Programs Compliance Manual* lists and describes thirteen types of investigatory programs to be undertaken by the Department in fulfillment of its statutory obligations under ERISA. *See, Compliance Manual*, Chapter 9, §§ 204.012 – 204.0213. None of these programs deal with delinquent contributions or audits of employers to discover underreporting or nonreporting of covered employees.

This silence is telling and consistent with the express Congressional decision to deny the Department of Labor the right to initiate an action for delinquent contributions. 29 U.S.C.

§ 1132(b)(2). Moreover, at the same time that it denied this right to the Department of Labor, the Congress recognized that "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Summary and Analysis of Consideration of S. 1076, Multiemployer Pension Plan Amendments Act of 1980 (Comm. Print 1980) (unnumbered document) at 44. To accomplish this goal, Congress amended ERISA to provide that when trustees successfully sued to collect unpaid employer contributions, courts must award to the plans not only the amount of the contribution, but also interest on the contribution, liquidated damages, costs of the action, and reasonable attorney's fees. 29 U.S.C. § 1132(g)(2).

D.

The court below also held that the trustees could delegate to the employees themselves the duty of determining whether they are plan participants. Such delegation turns all trust law on its head by imposing the duty of the trustee on the beneficiary. Regarding the participants' ability to recognize and assert their own rights under plans, suffice it to say that ERISA's disclosure requirements are a direct response to testimony by one worker after another that he/she had been unaware of the provisions and rules of the applicable employee benefit plan. *See*, 120 *Cong. Rec.* 29934 (1974) (remarks by Sen. Williams).

The trustees, employer, and union are not only three distinct entities, but each has its own separate and often adverse interests in the determination of who is a covered employee. The interest of the union and the employer arise from their obligations to see that the collective bargaining agreement, to which they are parties, is administered in accordance with its terms and the relevant provisions of federal and state law. Moreover, the employer has obligations to keep accurate records and make the proper contributions, duties it owes to the union, the federal government, and the plan. Nonetheless, there is a recognized constant tension between these employer obligations and the

reality of the employer's business relationship with the plan. That relationship is adversarial, for the plan is a creditor of the employer; the employer's business interest is to minimize the claims of all creditors, including the plan's claim for contributions.

The trustees have a broader interest and more comprehensive obligations than either the employer or the union. The trustees clearly have a duty to determine in the first instance who is eligible to receive benefits. This inquiry cannot be left to the point in time when an individual applies for benefits. The trustees have an ongoing interest in knowing exactly who are the plan participants, *i.e.*, identifying the potential beneficiaries of their trust. Absent a vehicle for determining who the trust participants are, the trustees have no way to ascertain for whom contributions must be made. These contributions, both once they are paid and while they are yet accounts receivable of the trust, are part of the trust *res*. *See*, 29 U.S.C. §§1082(b)(2), 1145.

Precluding the trustees from making a threshhold analysis to identify the plan participants by means of an audit denies the trustees access to the basic information, essential to fulfilling their common law and statutory fiduciary duties. Moreover, because the trustees have an overriding duty of loyalty to trust beneficiaries, the breach of which is subject to statutory sanctions, the trustees must be in a position to determine to whom they owe their allegiance.

Thus, the responsibility for the proper administration of the trust that the trustees owe to the federal government and all plan participants is more comprehensive than any duties owed by either the union or the employer. The court below has severely undermined the powers of the trustees to satisfy their independent responsibilities and has engendered a serious uncertainty as to how those responsibilities can be met.

V. CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to issue a Writ of Certiorari.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1982

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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED

Whether a multiemployer employee benefit fund maintained for Union workers can force a contributing employer to disclose confidential records concerning employees the Union has determined are not performing Union work in contravention of the Trust Agreement creating the Fund and in the absence of reasonable cause to believe that a particular employee should be a Fund beneficiary.

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Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,[1]

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Central Transport, Inc., et al., ("Transport") files its Brief in Opposition to the Petition for Writ of Certiorari ("Petition") of Central States, et al., ("Funds").

OPINIONS BELOW

The opinion of the district court is reported at 522 F. Supp. 658 and is attached to the Petition as Appendix

[1]Respondents, collectively styled Central Transport, are: Central Transport, Inc., Central Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping, Inc., Michiana Trucking, Inc., Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage, Bancroft Freight Lines, McKinlay Transport, Ltd., and Genessee Cartage.

A. The unanimous opinion of the Court of Appeals for the Sixth Circuit is reported at 698 F. 2d 802 and is attached to the Petition as Appendix B.

—o—

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1983 and is attached to the Petition as Appendix C. An Order deny rehearing *en banc* was entered on April 8, 1983 and is attached to the Petition as Appendix D. Jurisdiction of this Court has been invoked by Petitioner under 28 U. S. C. § 1254(1).

—o—

STATUTE INVOLVED

Sections 1102 through 1105 of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1001 ("ERISA") attached as Respondent's Appendix A.

—o—

STATEMENT OF THE CASE

Transport is a common carrier of goods for hire in intrastate and interstate commerce. Transport and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its various locals ("Union") are parties to the National Master Freight Agreement, parts of which are attached to the Petition as Appendix E and/or supplemental, individual agreements (collectively, "Collective Bargaining Agreements").

The Collective Bargaining Agreements create pension and health and welfare plans to which Transport contributes for the benefit of individual Union members. The Collective Bargaining Agreements also establish Trust Agreements which create the Funds. Parts of the Trust Agreements are attached to the Petition as Appendix F. The Funds are entities totally separate from the labor organizations and the participating employers. They are creatures of the Collective Bargaining Agreements between the Union and participating employers like Transport.

As a party to the Collective Bargaining Agreements, Transport became obligated to make, did make, and continues to make contributions to the Funds for the benefit of Transport employees who are covered by the Collective Bargaining Agreements and are eligible for benefits from the Funds. The Funds are charged with the fiduciary duty to receive and manage employer contributions for the benefit of Funds beneficiaries. However, the Funds have had many of their money management duties assigned to professional managers through a consent judgment with the Department of Labor, which settled allegations of gross mismanagement and assured that Funds money would not be managed by the Funds' trustees.

Transport's operations are conducted by both Union ard non-Union employees. Approximately sixty (60%) percent of Transport's employees are not covered by the Collective Bargaining Agreements. As to those employees, Transport is not required to make contributions to the Funds.

All of Transport's employees who meet the ERISA definition of "participant" are entitled to participate in

some employee benefit plan. On behalf of those employees covered by the Collective Bargaining Agreements, Transport contributes to the Funds. For those employees *not* covered by a Collective Bargaining Agreement, Transport contributes to its own defined benefit pension plan (the "Company Plan") which has been maintained since 1965, fully complies with ERISA and was approved by the Internal Revenue Service as a tax qualified plan. Any employee qualifying for coverage under the plans maintained by the Funds automatically is disqualified from coverage under the Company Plan. The result of any determination that a particular employee is performing Collective Bargaining Agreement work is to shift that employee from coverage under the Company Plan to coverage under the Funds. The result to the employee in that event could be the forfeiture of nonvested Company Plan benefits.

Transport and the Union determine which of Transport's employees are performing work under the Collective Bargaining Agreements and therefore are entitled to benefits contributions they receive from Transport. The right of any worker to receive benefits administered by the Funds is determined by whether he is covered by the Collective Bargaining Agreements. Those workers performing work covered by the Collective Bargaining Agreements are entitled to contributions to the Funds by Transport for their benefit. Those workers performing work ***not*** covered by the Collective Bargaining Agreements are not entitled to such contributions. The Union has always vigorously and effectively insured that all employees performing work under the Collective Bargaining Agreements receive all employee benefits to which they are entitled, including contributions to the Funds.

Neither the Collective Bargaining Agreements nor the Trust Agreements expressly provide that employers are required to furnish the Funds with employment records of all persons employed. Employers need only furnish records as to those persons *covered under the Collective Bargaining Agreements.*

On December 5, 1979, the Funds notified Transport by mail that an inspection of Transport's employment records would be made beginning during the week of January 14, 1980. On or about February 4, 1980, and continuing thereafter without interruption, the Funds' auditors conducted their audit of Transport's employment records. During the period of this audit, Transport offered to, and did, provide the appropriate records of its employees who were *covered* by the applicable Collective Bargaining Agreements but has refused to supply records for its employees who were not covered by the Collective Bargaining Agreements. Thereafter the audit was terminated.

The Funds instituted this action seeking a preliminary injunction requiring Transport to provide the Funds with confidential information of *all* of its employees—both those covered by the Collective Bargaining Agreements and those *not* covered by the Collective Bargaining Agreements. The Funds argued that they had a (i) contractual right under Article III, section 5 and Article IV of the Trust Agreements, (ii) statutory right under 29 U.S.C. §§ 1102-1105 (which lists trustee powers) and 29 U.S.C. § 1059 (which describes employer record keeping requirements), and (iii) common law right to review records of *all* employees. Transport contested these allegations up-

on contractual and statutory grounds, and upon the need for confidentiality of non-covered employee records.

Circuit Judge Cornelia Kennedy wrote a unanimous opinion of the Court of Appeals for the Sixth Circuit reversing the trial court, finding *inter alia* that (i) no contractual or statutory right to inspect records of non-covered employees exists, (ii) analogies to collective bargaining and NLRB disclosure rules cases are inapposite, (iii) the Funds are protected from liability if they do not review such records, (iv) the employees have adequate means through individual actions, the Union and the Secretary of Labor to prove they should be covered by the Collective Bargaining Agreements, (v) a prudent man would not expend Funds money to launch an audit of the records of *all* of Transport's employees under these facts, and (vi) the decision to commence such an investigation would be arbitrary and capricious and the expenditure of money for such an investigation unreasonable.

The Court did, however, grant the Funds the right to investigate the records of those four employees not on the Union seniority list for which the Funds had "reasonable cause" to believe were covered employees.

The Funds have petitioned this Court to allow the Funds to demand confidential records of employees who have not collectively bargained for such disclosure *without* reasonable cause to believe that those employees are covered by the Collective Bargaining Agreements.

———o———

REASONS FOR DENYING THE PETITION

1. The Petition Should Be Denied Because The Decision Of The Court Of Appeals Is Based Upon Specific Language Of The Trust Agreements Between Transport And The Union Which Created The Fund.

This matter is a simple question of contract interpretation, *i. e.*, whether the Trust Agreements define "employee" as *all* employees of Transport or employees of Transport covered by the Trust Agreements and Collective Bargaining Agreements.

The Sixth Circuit correctly found "the term 'employee', as used in the foregoing provision of the trust agreements, is not all-inclusive and does not comprehend *all* employees of Transport" (Petition Appendix B, p. A-20; emphasis in original) for two reasons.

First, "[n]on-covered employees are outside the scope of the collective bargaining agreements" (Petition Appendix B, p. A-21) so that contributions to the Funds are not part of the employment benefit package of non-covered employees. The Funds conceded in their Brief before the Sixth Circuit that:

(1) ". . . the Trust Agreements, the audit engagement letter, and the Central States Pension Fund refer to the collective bargaining agreement as the source of covered employment. [reference omitted]. This is uncontested and obvious." (Brief of Petitioner before 6th Cir. at p. 22); and

(2) "The Funds, of course, are not parties to the collective bargaining agreement which is, admittedly, the source of an employer's obligation to contribute. Certainly, the Trustees have no authority to *determine* coverage, that is to say to *define* and *decide* what job classifications *should*

be covered by the contract." (Brief of Petitioner before 6th Cir. at p. 29; emphasis in original); and

(3) ". . . only 'covered employees' may be defined as 'participants' and . . . the Trustees' fiduciary duties extend only to them." (Brief of Petitioner before 6th Cir. at p. 31).

Thus, the Sixth Circuit decision that the Funds cannot expand the term "employee" beyond the definition in the Trust Agreements is correct since the Funds admit that the Collective Bargaining Agreements determine covered employment, that the Collective Bargaining Agreements are the source of Transport's obligation to contribute to the Funds, that only employees covered by the Collective Bargaining Agreements may be Funds beneficiaries, and that the Funds are not parties to the Collective Bargaining Agreements.

Second, "[n]on-covered employees of Transport are outside the definitions of 'employee' contained in Article I, section 3 of the trust agreements." (Petition Appendix B, p. A-21). Subsection 3(a) identifies all employees of Transport who are covered by the Trust Agreements. The Sixth Circuit correctly found that Subsection 3(a) provides that "[a] person is an employee under the trust agreements if he or she is employed under the terms and conditions of a collective bargaining agreement *and* is a person, *i. e.*, a covered employee, on whose behalf payments are required by the collective bargaining agreement." It is written in the conjunctive; both conditions must be found for a person to meet the definition of employee.

The Court properly noted that limiting the definition of employee to covered employees (1) is consistent with the bargained for benefit negotiated only for Transport's covered employees (Petition Appendix B, p. A-24), (2) compliments the definition of employer under the Trust Agreements (Petition Appendix B, p. A-25), (3) was intended by the Union and Transport since they could easily have used the ERISA definition of employee *or* expressly stated that the definition includes *all* employees (Petition Appendix B, p. A-25), and (4) is consistent with proper contractual construction (Petition Appendix B, p. A-25).

If the definition of employee covers non-covered employees, the Funds must provide Funds benefits for them. The parties to the Collective Bargaining Agreements did not intend that result since Transport is only required to contribute for covered employees.

The Court held that Article IV of the Trust Agreements gives the Funds the authority to inspect Transport's records of any *particular employee* if the Funds have reasonable cause to believe that the employee is performing bargaining unit work but has not been classified by the Union and Transport as a covered employee. The Funds, however, want this Court to grant them the power to launch fishing expeditions into Transport's confidential records *in the absence* of reasonable cause to believe that the employee whose records are reviewed is performing work under the Collective Bargaining Agreements. The Sixth Circuit has been fair to the Funds—they are only prevented from acting totally beyond the scope of the Collective Bargaining Agreements. Even the Secretary of Labor must have good cause to investigate under

ERISA. (Petition Appendix B, p. A-30 n. 5). The decision below accords the Funds the authority necessary to conduct a complete audit.

To launch an audit of the records of all of Transport's employees, sixty (60%) percent of whom are not covered by the Collective Bargaining Agreements, is arbitrary and capricious (Petition Appendix B, p. A-32) and is itself a breach of the Funds' fiduciary duty by wasting Fund assets (Petition Appendix B, p. A-30).

2. The Petition Should Be Denied Because The Cases Cited By The Funds To Show An Alleged Inconsistency Between The Case Below And Other Circuits Are Totally Inapposite.

The Funds claim that the decision below is inconsistent with the decisions of this Court and decisions in the Third, Fifth and Eighth Circuits.

Third Circuit: *Rosen v. Hotel and Restaurant Employees, Local 274,* 637 F.2d 592 (3d Cir.), *cert. denied,* 454 U. S. 898 (1981). The Funds are attempting to mislead this Court into believing that the Funds determined plan participation in *Rosen.* At all relevant times, Mr. Rosen was a dues paying member of the union which collectively bargained for the benefit plan. Mr. Rosen's eligibility and coverage were already determined—the sole question was whether the employer was contributing for this admittedly covered participant. The very quote cited by Petitioner at pp. 13-14 of his Petition speaks to Rosen's "[c]ontinued eligibility."

Fifth and Eighth Circuits: *Robbins v. Prosser's Moving and Storage Co.* and *Robbins v. Schneider Moving Co.,* 700 F.2d 433 (8th Cir. 1983) and *Bugher v. Consoli-*

dated X-Ray Service, 705 F.2d 1426 (5th Cir. 1983) hold that fund trustees need not await completion of arbitration before bringing a court action to collect delinquent contributions. The Sixth Circuit did not require the Funds to exhaust a grievance remedy before coming to court. The Funds received a court decision. They simply do not like the decision they received.

Accordingly, no inconsistency among the Circuits exists. The only similar case is *Central States, Southeast and Southwest Areas Pension Fund v. CRST*, 641 F.2d 616 (8th Cir. 1981) which also holds that the Funds are limited to records of covered employees. The Funds would have this Court believe that *CRST* was "substantially overruled" (Petition at p. 29) by *Robbins, supra*. In actuality, *Robbins* only stated that *CRST's* decision should not be read to require arbitration prior to filing a court action:

> "We hold only that the trustees may come into court without first getting the union to invoke the machinery of arbitration. To the extent that *Farmer, Layne-Western* and *CRST* are inconsistent with this holding, they are overruled."

Robbins, supra at 443.

3. The Petition Should Be Denied Because There Is No Statute Authorizing The Funds To Act For Non-participants.

Judge Kennedy correctly found in the unanimous opinion of the Sixth Circuit that ERISA requires a fiduciary to act:

(1) "solely in the interest of the participants and beneficiaries" which does not include non-covered employees (Petition Appendix B, p. A-19) and

(2) "in accordance with the documents and instruments governing the plan" which includes the Collective Bargaining Agreements between Transport and the Union and the Trust Agreements (Petition Appendix B, p. A-19).

In fact, the Sixth Circuit unanimously found that the Funds had a fiduciary duty ". . . not to undertake unreasonable investigations or inspections to pursue employee coverage or waste trust assets by unreasonably broad audits" (Petition Appendix B, pp. A-29-30), and that "[a] prudent man would not authorize the audit of the records of all of Transport's employees under these circumstances." (Petition Appendix B, p. A-30).

Before the Sixth Circuit, Petitioner alleged an analogy to NLRB disclosure rules. The Court held that the standard of disclosure to the Union under collective bargaining cases was different than that under multiemployer benefit plans to which the Funds were not even parties. Moreover, even if the labor standard were applied, the Funds failed to show the relevance of the information requested and failed to show that the rights of Transport and its non-covered employees were taken into account (Petition Appendix B, p. A-32).

The Funds have now raised an analogy to Fair Labor Standards Act cases (which was never asserted in the Courts below) and which similarly fails to reverse the clear mandate of ERISA to act "solely in the interests of participants and beneficiaries" (Petition Appendix B, p. A-19) and "in accordance with the documents and instruments governing the plan." (Petition Appendix B, p. A-19). The Funds have not been granted a statutory investigative power analogous to the Department of Labor

under the Fair Labor Standards Act. The Secretary of Labor has been given that right under ERISA, and then only upon good cause shown. The Sixth Circuit stated:

> "It seems unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records." (Appendix B, p. A-30 n. 5).

4. The Petition Should Be Denied Because Finding A Duty To Investigate Records Of All Employees Would Result In Total Chaos.

If the Funds prove a statutory duty to investigate records of *all* employees of an employer which contributes to their multiemployer benefit plan, the result will be chaos. Transport contributes to several multiemployer plans, each of which would have a *duty* to investigate records of *all* employees to ferret out a possible beneficiary somehow forgotten by his Union, forgotten by the Department of Labor, forgotten by the employer and forgotten by the employee himself. Complying with those investigations would require employees dedicated to no other task.

Moreover, a multiemployer plan which represents a handful of beneficiaries at a given company would be charged with a duty to investigate thousands of employee records to seek out possible beneficiaries that the Union felt were not covered by the applicable collective bargaining agreements. Clearly, those funds would be breaching their duty to identified beneficiaries if they expended the required time, money and effort to search for additional beneficiaries and participants and would also be breach-

ing their new found duty of investigation if they did not so investigate. The cost of such duplicative investigations would be staggering.

CONCLUSION

The unanimous decision of the Sixth Circuit determined this contract controversy and properly balanced the desire of the Funds for auditing rights with the need for protecting the confidential records of employees who had not contracted through the Union for such disclosure. Potential beneficiaries are protected through the efforts of the Union in vigorously enforcing the Collective Bargaining Agreements which are the source of the Funds themselves.

Respectfully submitted,

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APPENDIX A

29 U. S. C. §§ 1102-1105

§ 1102. Establishment of plan

Named fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite features of plan

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c) (1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

Optional features of plan

(c) Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c) (1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Pub. L. 93-406, Title I, § 402, Sept. 2, 1974, 88 Stat. 875.

§ 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c) (3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(i) some or all of the participants of which are employees described in section 401(c) (1) of Title 26; or

(ii) which consists of one or more individual retirement accounts described in section 408 of Title 26, to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, which ever is applicable;

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this Act—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b) (7) of Title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2) (A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on qualification of the plan under section 401, 403(a), or 405(a) of Title 26, and if the plan does not qualify, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the date of denial of qualification of the plan.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of Title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a contribution which would otherwise be an excess contribution (as defined in section 4972(b) of Title 26) paragraph (1) shall not prohibit a correcting distribution with respect to such contribution from the plan to the employer to the extent permitted in such section to avoid payment of an excise tax on excess contributions under such section.

(4) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to

the employer within 6 months after the date of such determination.

(d) (1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

Pub. L. 93-406, Title I, § 403, Sept. 2, 1974, 88 Stat. 876.

§ 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless un-

der the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d) (3) of this title), the diversification requirement of paragraph (1) (C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1) (B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d) (4) and (5) of this title).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

Pub. L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877.

§ 1105. Liability for breach of co-fiduciary

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Assets held by two or more trustees

(b) (1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated

shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104 (a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

Investment managers

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

Pub.L. 93—406, Title I, § 405, Sept. 2, 1974, 88 Stat. 878.

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NO. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT INC., et. al.,
Respondents.

CENTRAL STATES' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CENTRAL STATES' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

NOW COME Petitioners, the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, and, pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, file this Supplemental Brief in Support of their Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

I. Recent decisions and other intervening matter support Petitioners' contention that fund trustees must conduct complete and independent audits of employers' records and that reliance on the efforts of unions or participants themselves is misplaced.

Introduction

Succinctly put, the basic issue before the Court in this Petition is whether allegations of confidentiality suffice to limit access to tax and payroll records where trustees of

employee benefit funds seek to conduct random general audits of contributing employers' records in order to verify the accuracy of reporting, to safeguard the benefits of all eligible plan participants, and to protect the actuarial solvency of the Funds, *and* where specific safeguards are offered to protect the confidentiality of records. The Sixth Circuit limited the scope of a permissible random audit to the records of employees whom the *employer* conceded were covered by the collective bargaining agreement unless the Trustees had reasonable cause to believe particular individuals were wrongly or at least questionably excluded from coverage.[1]

In so concluding, the court believed that the efforts of unions and of employees themselves could adequately safeguard the Funds. Not surprisingly, Central Transport in its Brief in Opposition states at page 4:

> The Union has always vigorously and effectively insured that all employees performing work under the collective bargaining agreements receive all employee benefits to which they are entitled, including contributions to the Funds.

This assertion falls of its own weight in light of some recently decided cases as well as other intervening matter

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[1] Respondents' have raised what appears to be a new issue in their "Question Presented." There is nothing in the record or the decisions below indicating that the Trustees demanded to audit records for employees whom the *Union already determined were not covered by the collective bargaining agreement*. Such an issue was not before the Court. The *employer* claimed that 60% of its employees were not covered and refused to produce records for these persons (Petition, p. 4). Respondent's phrasing of the "Question Presented" serves only to exaggerate Central Transport's claims of confidentiality. Central Transport's "Question Presented" also implies that the Funds are "maintained for Union workers." The Court of Appeals, in setting forth its statement of facts, explicitly noted that union membership was *not* a prerequisite for coverage and hence *not* a prerequisite for contributions and benefits (*see* Petition, A-16). To characterize Petitioners as Funds created and administered *only* for union workers similarly distorts the issue and magnifies Central Transport's confidentiality defense.

that has come to light subsequent to the filing of the Petition on July 2, 1983.

a) New intervening matter

On July 6, 1983, a by-lined report appeared on the front page of the New York Times, reprinted herein as Appendix A, which confirms the need for independent and complete trustee audits of contributing employers' records. According to the report, executives of certain construction companies in the dry-wall industry of metropolitan New York allegedly conspired to withhold from a carpenters' union welfare fund "more than $10 million over a four year period." This was allegedly effected through a scheme of "making 'off the books' or concealed payments in cash to employees" in lieu of regular wages recorded for tax purposes. Investigation thus far has suggested that some of the companies may have engaged in these "illegal practices with the knowledge and approval of some carpenters union officials from 1978 to 1981."

In their Petition, Central States noted that the purpose of comparing *complete payroll records with IRS 941 forms* at the initial stage of an audit was necessary precisely in order to uncover cash disbursements or hidden payments (*see* Petition, pp. 6, 9). The Sixth Circuit ruling forbids such a comparison.

Clearly, to the extent that fund trustees are precluded from examining tax and payroll records and from conducting comprehensive audits, situations such as that described in the New York Times article are more likely to occur. Conversely, it is clear that the financial solvency of employee benefit funds cannot be allowed to depend on random investigations undertaken by the IRS, the Justice Department, or the F.B.I. Moreover, the relevance of particular records for the audit purpose requested should not depend on who requests their production.

b) New cases

As observed in the *Petition* (pp. 12-16), the interests of unions and employee benefit funds do not necessarily coincide, often for quite legitimate reasons.[2] Sometimes, however, unions or their representatives fail to protect both the interests of funds and the interests of individual bargaining unit members either by acts of omission[3] or for meritricious reasons. An example of the latter is *U.S.* v. *Russo*, 708 F.2d 209 (6th Cir. 1983, reported subsequent to the filing of the Petition). Here, the Court of Appeals for the Sixth Circuit affirmed the conviction of two employers *and a local business agent* for conspiracy to violate the Hobbs Act (18 U.S.C. § 1951) and for an actual violation of the statute. The conduct underlying the conviction was the use of threats to compel owner-operators to relinquish a percentage of their earnings to cover contributions to the Central States Pension and Health and Welfare Funds which the *company* was required to pay on their behalf under the National Master Freight Agreement (the same collective bargaining agreement to which Central Transport is signatory!). The contract explicitly prohibits employers from making such deductions from owner-operators' earnings which have the effect of forcing these employees to make their own fringe benefit contributions. This case raises the implication that employees might sometimes find it difficult to protect their own interests in the event a representative of the union fails to act on their behalf (*see* Petition, p. 15).

Another aspect of the problem is revealed in *Kemmis* v. *McGoldrick*, 706 F.2d 993 (9th Cir., May 24, 1983, reported June 27, 1983 and hence after the Petition was printed). Here, the Court of Appeals for the Ninth Circuit found

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[2] *See Robbins* v. *Prosser's Moving and Storage Co.*, 700 F.2d 433 (8th Cir. *en banc*, 1983, Petitions for Certiorari filed May 17, 1983, Nos. 82-1860 and 82-1862, cited in Petition."

[3] *See U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir., April, 1983, cited in Petition).

itself compelled to disallow a side-agreement between a union and an employer or an oral modification of a collective bargaining agreement which, if allowed to stand, would have had the effect of prejudicing the third-party beneficiary trust fund in question although the particular employee involved would still have received his benefits. The employee in that case was a full-time salaried union employee who was engaged in "split-work," e.g., work that was partly covered by the collective bargaining agreement and partly outside the contract. The employer had executed a short form agreement incorporating a Master Survey Agreement by reference. Under the master agreement, as interpreted, employers were required to contribute for *all hours worked* by employees who perform *any* work covered by the contract. In the case of full-time, salaried employees, contributions were required based on a 40-hour week. The trustees of the fund had sent notices to all employers explaining contribution requirements under this contract. Nevertheless, the employer and the local orally agreed that the employer would pay only on "the minimum hours necessary for his employee to maintain eligibility benefits." McGoldrick reported and contributed based only on 200 hours per calendar quarter. The trustees filed suit for delinquent contributions. The district court found for the employer based on the oral understanding. The court of appeals reversed.

To the extent the Court of Appeals for the Sixth Circuit predicated its ruling on the assumption that unions can be adequately relied upon to protect the interests of employee benefit funds as well as those of their constituency and that employees can and should be relied on to protect their own interests, the New York Times article and the cases discussed above tend to suggest the opposite.

II. The concept "concededly covered employees" is unworkable in practice and logically untenable.

In their *Amicus* Brief, the National Coordinating Committee for Multiemployer Plans (NCCMP) made reference to

two recent cases: *McNeff* v. *Todd*, 103 S. Ct. 1753 (1983) and *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983). In both these cases, audits resulting in obligations the respective courts enforced could not have taken place under the *Central Transport* ruling since the employers asserted in both instances that certain employees were *not* covered by the contracts in question.

A similar situation is revealed in *Laborers Health and Welfare Trust* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983, reported after the filing of the Petition). Here, a coverage dispute in a trustee collection action arose subsequent to a fund audit. The audit revealed and the trustees claimed $131,887.68 in unpaid pension contributions on behalf of a class of unskilled employees performing "callback work." The employer contended that "callback work" was not within the union's jurisdiction and that the employees performing it were not covered by the collective bargaining agreement. The district court granted the employer's motion for summary judgment. The court of appeals reversed and remanded for trial on the work coverage issue. But for the audit, the trust fund in question would not have discovered that "the Company used nonunion labor for 'call-back work' and that no pension contributions were made for such labor." In accordance with *Central Transport*, however, this audit, too, could not have been conducted, which would have precluded the trustees from attempting to collect amounts it contended the employer rightfully owed the funds.

These three cases illustrate the impracticability of placing the scope of a Fund audit in an employer's hands.

CONCLUSION

In *Fusari* v. *Steinberg*, 419 U.S. 379, 391, Chief Justice Burger wrote in his concurring opinion: "This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of *any*

development which may *conceivably* affect an outcome" (emphasis supplied). In *Fusari*, counsel had neglected to inform the Court of a change in state law which might have rendered certain due process challenges moot. Chief Justice Burger, however, did not limit the informational duty of counsel to events of such magnitude as legislative changes. Petitioners submit that the New York Times article and the three new cases discussed above can be regarded as "developments" which could "conceivably affect the outcome" of the Court's decision to grant their Petition. It is in this spirit that the present Brief is filed.

Respectfully submitted,

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Appendix A
New York Times–July 6, 1983, p. 1

APPENDIX A

INVESTIGATORS CHARGE CONTRACTORS FORMED 'CLUB' FOR TAX FRAUD

By SELWYN RAAB

Federal investigators say they have uncovered evidence of multimilliondollar fraudulent schemes and instances of tax evasion by a group of New York City building contractors who secretly banded together and called themselves "the Club."

The purported labor-racketeering crimes by executives of key companies in the local dry-wall construction business included the withholding of more than $10 million over a four-year period from a carpenters union welfare fund, Federal law enforcement officials said.

Agents of the Federal Bureau of Investigation, the Internal Revenue Service and the Labor Department are also said to have found millions of dollars of "off the books," or concealed, payments in cash to employees. Those payments were made instead of the regular payment of wages that would be recorded for tax purposes, the officials said.

The Organized Crime Strike Force in the Eastern District of New York is presenting evidence on the schemes to a Federal grand jury in Brooklyn.

The withholding of payments to the union welfare fund is expected to lead to fraud charges against executives of at least five contracting concerns, investigators said. They added that the concealed wages would result in tax evasion charges against officers of the companies as well as employees who failed to report the wages as income.

Federal officials said the unrecorded wages allowed the construction companies to evade taxes and mandatory contributions to the union's welfare fund. The scheme was also used to pay several hundred employees lower wages than

Appendix A
New York Times–July 6, 1983, p. 1

were required in the contract with their union, the New York City District Council of Carpenters.

Dry-wall contractors build interior walls in commercial and residential buildings. Most of the violations, the investigators said, occurred on projects in Manhattan and involved companies that are members of a construction trade group, the Metropolitan New York Dry Wall Contractors Associations.

$100 Million in Contracts

The 20 companies in the association generally obtain most of the private and public dry-wall contracts in the city, totaling more than $100 million a year, according to construction industry experts.

Irving Mazzer, the executive director of the association, failed to reply to four telephone calls to his office in Manhattan requesting comment on the inquiry.

Investigators identified some of the companies under investigation as Ace Partitions Inc., 2216 Bath Avenue, Brooklyn; the Circle Industries Corporation, 4817 Baldwin Avenue, the Bronx; the Graphic Construction Company, 909 Third Avenue, Manhattan; Prince Carpentry Inc., 115 East 57th Street, Manhattan, and the Standard Drywall Corporation, 2203 Avenue X, Brooklyn.

Attempts to reach officials of the companies for comment yesterday were unsuccessful.

Investigators said that during an investigation of another matter in 1980 the F.B.I. and Federal prosecutors learned about the Club from court-authorized electronic eavesdropping at the East 23rd Street office of Theodore Maritas, who was then the president of the District Council of Carpenters, A.F.L.-C.I.O., a union representing 25,000 carpenters in the metropolitan area.

Appendix A
New York Times–July 6, 1983, p. 1

The intercepted conversations between Mr. Maritas and other people, officials said, led to additional inquiries, including the examination of company records.

The investigation, officials said, found that some companies in the dry-wall contractors association might have engaged in illegal practices with the knowledge and approval of some carpenters union officials from 1978 to 1981.

In the taped conversations, according to investigators, executives of the companies and Mr. Maritas identified companies in the association that were permitted to disregard union contract provisions as the Club.

Missing Labor Leader

Mr. Maritas disappeared in March 1982 after being indicted on Federal charges that he had helped to extort more than $125,000 from nonunion contractors in Manhattan and Queens in return for labor peace. Federal prosecutors believe Mr. Maritas, who is still missing, has been murdered to prevent him from cooperating with authorities in a broader investigation of labor racketeering.

"If these charges are true, I will be in a coma over the losses to the welfare fund," said Joseph Lia, the acting head of the District Council of Carpenters.

Edward A. McDonald, the Federal attorney who is the head of the Organized Crime Strike Force in the Eastern District, confirmed that his office was "conducting an inquiry into the dry-wall industry and labor racketeering."

In an interview, he said the inquiry was an outgrowth of the Lil Rex case—an acronym for Long Island Labor Racketeering and Extortion, an investigation by the F.B.I. in the late 1970's.

Appendix A
New York Times–July 6, 1983, p. 1

Evidence for Grand Jury

Mr. McDonald and Douglas E. Grover, an attorney with the strike force who is presenting evidence to the grand jury in Federal District Court in Brooklyn, declined to give further details.

But other law enforcement investigators and officials who are familiar with the case agreed to be interviewed on the condition that they not be identified.

The first indictments involving one company under scrutiny are expected later this month or in August, according to the officials. Executives and employees of other dry-wall companies are expected to be indicted later this year, the officials said.

They said that while looking for irregularities in the carpenters union's welfare fund, investigators turned up evidence of tax evasion by hundreds of employees who were paid off the books.

Criminal charges will be brought against employees who collected the concealed wages and also obtained unemployment benefits from the state, the officials said.

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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

This Court invited the United States to express its views by Order dated October 3, 1983. As late as April, 1984, the United States informed Central Transport, Inc., et al., ("Transport") that it had not concluded whether this case was worthy of review. The United States now alleges that the decision of this Court in *Schneider Moving & Storage Co. v. Robbins*, No. 82-1860 (U.S. April 18, 1984)

requires the grant of a Writ of Certiorari or that the judgment of the court of appeals in this case (*"Central Transport"*) should be vacated and the case remanded for reconsideration.

Transport has already asserted why this matter is not worthy of this Court's review (Brief in Opposition to Petition, dated July 19, 1983). This Brief is limited to expressing why the *Schneider* decision calls for neither review by this Court nor remand to the court of appeals.

DISCUSSION

This Court held in *Schneider* that Central States, et al., ("Funds") did not have to exhaust arbitration procedures before seeking judicial enforcement of Trust Agreement provisions. The decision in *Central Transport* does not conflict with that holding. In fact, the *Central Transport* court specifically recognized the inability of the Funds to invoke the union-employer arbitration procedure by granting the Funds direct judicial access to confidential employer records if the Funds have "reasonable cause" to suspect contribution delinquencies.

The *Central Transport* court held:

> . . . the terms of Article IV of the trust agreements . . . give the trustees the power and authority to inspect Transport's books and records and question such persons as they deem necessary to enable them to determine facts relative to a particular employee's covered or non-covered status if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement, i.e., is doing bargaining unit work, but has not been

> placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee.

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 698 F.2d 802, 810 (6th Cir. 1983), *rehearing and rehearing en banc denied;* (Petition Appendix B, p. A-28). The *Central Transport* court gave the Funds a "reasonable cause" right of inquiry to compensate them for their lack of access to the grievance/arbitration mechanism of the collective bargaining agreements:

> The Funds have no contractual right to participate in this dispute resolution process [the grievance/arbitration mechanism]. The "reasonable cause" standard strikes a balance between the trustees' needs to satisfy their statutory and contractual obligations in the limited situations in which the investigation of proper Funds' contributions are warranted yet preserves the privacy and integrity of the grievance and arbitration provisions agreed to by Transport and the Union as a means of resolving questions of employee coverage.

(*Id.* at 812; Petition Appendix B, p. 17). That holding does not violate the rule in *Schneider* but extends the *Schneider* holding to its logical conclusion and balances the interests of all competing parties.

The United States would destroy the reasonable cause standard of restraint. The Funds would merely have to make a self-serving allegation that underfunding may have occurred for admittedly covered employees to get access to the confidential employment and wage records of *all* employees—even those of shareholder-officers of the employer. The United States would have *Schneider* give the Funds the power to review all records without regard to any standard of propriety.

The United States asserts that the *Central Transport* court made its decision before *Schneider* was decided. That is at the same time both true and immaterial. The March 24, 1982 decision of the Eighth Circuit in *Schneider* prior to rehearing *en banc* was cited by the Funds before the Sixth Circuit in this case and was presumably considered by the Sixth Circuit. That decision held:

> This [arbitration] provision, when read in connection with the Trust Agreement provision which authorizes the Trustees to institute legal actions in order to enforce payment of amounts which may be owed to the Funds, seems to indicate that the parties did not contemplate that the Trustees are required to resort to the grievance-arbitration procedures delineated in the collective bargaining agreements in all cases.
>
> We think this conclusion comports with national labor policy. . . .
>
> In addition, the Trustees should not be required to ask the Union to arbitrate this dispute.

Robbins v. Prosser's Moving & Storage Co., and *Robbins v. Schneider Moving Co.*, Nos. 80-2116, 80-2117 (8th Cir. March 24, 1982). (This opinion was published in the advance sheet at 673 F.2d 246 but was withdrawn from the bound volume because rehearing was granted.) Moreover, the Sixth Circuit reconsidered its decision in denying a rehearing and a rehearing *en banc* to the Funds.

Even the Eighth Circuit did not find its *en banc* decision in *Schneider* as overruling its entire opinion in a case with facts similar to this case. *Central States, Southeast and Southwest Areas Pension Fund v. CRST*, 641 F.2d 616 (8th Cir. 1981) limited the funds' audits to records of covered employees. Thereafter, when the Eighth Circuit issued its *en banc* decision in *Schneider*, the court only stated that *CRST*'s decision should not be read to require arbitration prior to filing a court action:

> We hold only that the trustees may come into this court without first getting the union to invoke the machinery of arbitration. To the extent that . . . *CRST* [is] . . . inconsistent with this holding, . . . [it] is overruled.

Robbins v. Prosser's Moving & Storage Co., and *Robbins v. Schneider Moving Co.*, 700 F.2d 433, 443 (8th Cir. 1983).

The Eighth Circuit *en banc* and this Court did not change the substance of the finding of the original panel of the Eighth Circuit in *Schneider*. Accordingly, the court of appeals in *Central Transport* had the reasoning of *Schneider* in the materials submitted by the Funds which it considered in issuing its opinion.

CONCLUSION

The decision of this Court in *Schneider* does not mandate the issuance of a Writ of Certiorari or the vacation of the unanimous decision of the Sixth Circuit Court of Appeals. Judge Cornelia Kennedy had the first *Schneider* appellate court decision before her when she determined this contract controversy and properly balanced the competing interests of the Funds and Transport. The Sixth Circuit further considered the *Schneider* reasoning when it denied the Funds' motion for rehearing and for rehearing *en banc*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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JOINT APPENDIX

1. Chronological List of Relevant Docket Entries

a) District Court entries in No. 80-71872

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8/25/80	Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted with Brief, Affidavits, and Exhibits	5
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Date	Proceedings	Docket Entry No.
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2. Reference to Materials printed in Central States' Petition for Certiorari

Pursuant to Rule 30.1 of the Rules of the Supreme Court of the United States, the Court is hereby referred to the Petition for Certiorari for:

1. Decisions of the courts below
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3. Denial of Petition for Rehearing *En Banc*
4. Relevant provisions of the collective bargaining agreement (National Master Freight Agreement)
5. Relevant provisions of the Trust Agreements governing the Central States Funds
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7. DOL Advisory Opinions
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JA6

No.

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

In implementing a field audit program in accordance with the "prudent man" rule of ERISA, may the trustees of multiemployer employee benefit funds, without being arbitrary or capricious, request access to payroll, tax, and other "pertinent records" relating to the wages, hours and duties of *all* employees of contributing employers:

1) Where the purpose of the audit is to monitor a self-reporting system and to assure compliance with statutory and contractual obligations;

2) Where the funds must award service credits and benefits to employees on the basis of work performed under a collective bargaining agreement even in the absence of employer contributions;

3) Where records relating to an employer's complete work force are necessary to comply with generally accepted auditing standards;

4) Where substantial safeguards are offered to protect the confidentiality of employee records;

5) Where the trust agreements governing the funds, as construed by the trustees, authorize such audits;

6) Where, absent such audits, the trustees must rely on the discretionary efforts of unions, employees, or the Secretary of Labor to oversee employer contributions and hence to protect the actuarial solvency of the funds.

OR

May employers withhold the records of all employees except those they *concede* are covered by the collective bargaining agreement *unless* the trustees first established reasonable cause to believe that other individuals perform bargaining unit work and should be reported regardless of how the employer has classified them?

LIST OF RESPONDENTS

Respondents, collectively styled Central Transport, are: Central Transport, Inc., Central Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping Inc., Michiana Trucking, Inc., Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage, Bancroft Freight Lines, and McKinlay Transport, Ltd. Central States originally filed suit also against Genessee Cartage; this company was omitted from the appeal.

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No. 82-2157

In the

Supreme Court of the United States

October Term, 1983

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The district court opinion is reported at 522 F. Supp. 658 and set forth in Appendix A to the Petition for Certiorari (A 1-14).[1] The opinion of the court of appeals is reported at 698 F.2d 802 and set forth in App. B P.C. (A 15-34).

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1983 (App. C P.C., A 35-36). A Petition for Rehearing *en banc* was denied on April 8, 1983 (App. D P.C., A 37). Central States filed its Petition for Certiorari on July 2, 1983. On October 3, 1983, this Court granted

[1] All further references to this Appendix will be indicated by the abbreviation "App. P.C." and the appropriate subsections ("A"-"J") followed by page numbers. Central States' Complaint and audit engagement letter are reprinted as Appendix A and B to this Brief.

leave for three Amici to file Briefs in support of the Petition.[2] On this date, the Court also invited the Solicitor General to express the views of the United States. In May, 1984, the Solicitor General together with the Solicitor of Labor filed a Brief in support of the Petition. The Solicitor General was also authorized to represent that the PBGC concurred in the view that further review was warranted (Sol. Gen. Brief, p. 18, fn. 16). This Court granted Central States' Petition on June 18, 1984. Jurisdiction was invoked under 28 U.S.C. § 1254(1). The court of appeals assumed jurisdiction under 28 U.S.C. § 1292(a)(1); the district court assumed jurisdiction under 29 U.S.C. § 185(a) (LMRA) and 29 U.S.C. § 1132 (ERISA).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 141, *et seq.*, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364), are set forth in App. G P.C. (A 50-81).

PETITIONERS' STATEMENT OF THE CASE

1. Introduction

Central Transport, an interstate trucking company, like some 12,000 other employers engaged in transportation and other industries, operates its business pursuant to collective bargaining agreements with Teamster local unions. These agreements require specified weekly contributions to the Central States Health and Welfare and Pension Funds on behalf of each employee who performs bargaining unit work. The Trustees of the Central States Funds are required by ERISA and corresponding regulations to sys-

[2] The National Coordinating Committee for Multiemployer Plans (NCCMP) and the Bricklayers Fringe Benefit Funds—Metropolitan Area et al. (together representing more than 150 Taft-Hartley pension and welfare plans and over 8 million American workers employed in various major industries throughout the United States); and Arthur Young & Co. (a "Big Eight" accounting firm which audits employer records and also multiemployer plans, including Central States).

tematically ascertain and collect all contributions owed by employers under operative collective bargaining agreements. The Trustees of the Pension Fund are also required by law to grant service credit and ultimately benefits to anyone who has performed bargaining unit work regardless of whether the employer has remitted corresponding contributions. Because of its size, Central States, like most multiemployer plans, operates on a self-reporting system. Thus, the Trustees *must* rely on employers to report accurately. Because a significant number of employers do not report or contribute *regularly* on behalf of some eligible employees or *at all* on behalf of others, the Trustees conduct *random* field audits to inspect employer accounts. The specific issue for review is whether, in conducting audits to verify the accuracy of reporting, fund trustees may request access to pertinent records relating to *all* employees in a contributing employer's work force, since it is possible for an employee to perform bargaining unit work but not be reported. Notwithstanding the fact that independent verification of data lies at the heart of generally accepted auditing standards, the court of appeals held that the Trustees may not conduct such *general* audits. Absent *reasonable cause* to believe that a *particular omission* has occurred, the Trustees are *limited* to the records of employees the employer *concedes* are "covered" by the collective bargaining agreement (App. B P.C., A 31-32).

In its opinion, the court of appeals did not address the magnitude of the problem of misreporting to Taft-Hartley trust funds,[3] did not address the function of random general audits as a device to deter as well as to uncover delinquent contributions, did not analyze the role of generally accepted auditing standards in ERISA, did not address the need for trustee independence in the area of audits and collections, and departed from the standard of judicial review traditionally applied by other courts in interpreting trustee decisions under the common law of trusts, which law has been incorporated into the "prudent man" rule of ERISA. Focusing heavily on the cost of audits and on the confidentiality of employee records, rather than on the Trustees' need to obtain verification data independently and to pre-

[3] A "Taft-Hartley" trust is one established and governed in accordance with Section 302(c)(5) of the LMRA.

vent a drain on fund assets, the court restricted the permissible scope of an audit, erected a "reasonable cause" threshold, and thus inhibited the Trustees in the performance of a core fiduciary duty ordained by statute and embodied in relevant contracts. In so doing, the court rejected the Trustees' contention that by limiting the records open to inspection, the *employer*, which has sole and ready possession of the information needed, would control the audit although the Funds, which have no other feasible access to the data, would bear ultimate financial responsibility.

Petitioners are two of the largest trust funds in America. With assets in excess of four billion dollars, the Central States Health and Welfare and Pension Funds serve some 500,000 active workers, retirees, and their families who depend on them for retirement income and health coverage and thus rely on the Trustees to determine and collect contributions, protect fund assets and otherwise assure actuarial solvency. While the court of appeals recognized the need to "correlate" disbursements from and contributions to the Funds, it rejected the *method selected by the Trustees* as the ordinary and natural means for achieving this result in accordance with the broad administrative discretion vested in them by ERISA, the LMRA, the Trust Agreements governing the Funds, and the common law of trusts.

The importance of the Trustees' claim of right to determine the reasonable scope of an audit of contributing employer records and to conduct it in accordance with generally accepted auditing standards as well as the magnitude of the court of appeals' misapprehension of the issue is evidenced by the detailed Briefs filed in support of Central States' position by representative *Amici*, including the Department of Justice and the Department of Labor, with the concurrence of the Pension Benefit Guaranty Corporation.

This is a case of first impression involving an issue of great national importance rather than one seeking resolution of a direct conflict between or among the circuits. While Central States seeks a reexamination of its *contractual* right to conduct the type of audit requested and hence an enunciation of the proper standard for the judicial review of

Trustee interpretations of the Trust Agreements which articulate their powers, Petitioners have a more fundamental request; namely, that this Court give specific content to the "prudent man" rule of ERISA (29 U.S.C. § 1104) as Congress *expressly* envisioned: "The conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." House Conf. Rept. 93-1280 (Pub. L. No. 93-406), 3 *U.S. Code Cong. & Ad. News* 5083 (1974). To this end, it may be well at the outset to reflect upon Congress's finding that private pension and benefit plans, dedicated to the security and well-being of millions of Americans, are affected with a national public interest impacting interstate commerce and the tax revenues of the United States (29 U.S.C. § 1001); that the financial health of such plans has become ever more important as a result of the increasing fragility of the Social Security system, the escalating costs of medical care, and the increasing life-expectancies of this country's citizens together with an entrepreneurial effort to encourage earlier retirement; that trustee efforts to maximize fund assets through vigorous enforcement of contractual obligations are motivated *solely* by a fiduciary obligation to protect the interests of plan participants and beneficiaries and are not *in any way* directed toward private gain; that most multiemployer plans operate on a self-reporting system analogous to that underlying the federal tax scheme; that Congressional concern with delinquencies led in 1980 to the creation of a new and specific ERISA cause of action where an employer violates the terms of a collective bargaining agreement or a multiemployer plan;[4] and, finally, that Congress chose not to interpose a governmental entity between employers and employees to enforce routine compliance with ERISA but left this task to the Trustees themselves through procedures to be designed by them, pursuant to the "prudent man" rule (29 U.S.C. § 1104), and in accordance with the particular constituency, needs, and circumstances of the plan. Throughout this Brief, Petitioners will therefore view mul-

[4] *See*, Section 306 of the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364); 29 U.S.C. § 1145 (App. G P.C., A 80). Trustees prevailing in a collection action under this section of ERISA are entitled to the mandatory award of the principal amount of delinquent contributions, interest, statutory damages, and attorney fees.

tiemployer plans as quasi-administrative in nature and trustees as functional equivalents of the Tax Commissioner charged with "canvassing" the United States to "inquire after" and collect any tax due (26 U.S.C. § 7601, *et seq.*) and the Administrator of the Wage and Hour Division of the DOL charged with verifying employer compliance with the Fair Labor Standards Act (29 U.S.C. § 211).

2. The audit of Central Transport

"Central Transport" ("Transport") is the collective name for 16 companies admittedly engaged in or supportive of interstate trucking (*see* p. ii; Appellants Brief, p. 1). Each of these companies was admittedly signatory to the National Master Freight Agreement (NMFA) and one or more of its Supplemental Agreements executed between itself and a Teamster local (App. A P.C., A 3; App. B P.C., A 16). Pursuant to these agreements, Transport was obligated to remit on a monthly basis specified weekly contributions for each employee "covered" by the contract.[5]

The Trust Agreements governing each Fund are incorporated by reference in the respective health and welfare and pension provisions of the collective bargaining agreement (App. A P.C., A 3; App. E P.C., A 38-42). By executing the NMFA, Transport admittedly agreed to ratify all acts taken or to be taken by the Trustees of the Central States Funds within the scope of their authority (App. A. P.C., A 3-4; D-5, p. 3, para. 8).[6] Transport also admittedly executed a "Participation Agreement" (pertinent to the

[5] An employee is "covered" under the NMFA if he performs any work in a specified "job classification" or employer "operation" (Article 2, App. E P.C., A 38). Depending on the particular Supplement (Local Cartage, Over-the-Road, Iron and Steel and Special Commodities), job classifications include such categories as drivers, chauffeurs, driver-helpers, dockmen, warehousemen, power lift operators, etc. (Appellees' Brief, p. 2). Union membership is *not* a prerequisite for "coverage" as the Sixth Circuit found (App. B P.C., A 16). A "covered" employee does not become "eligible" for contributions unless he has been on the payroll as a "regular" employee (as opposed to an "extra" or "temporary") for 30 days or more.

[6] References to the district court record will be indicated by a "D" followed by the entry and, where appropriate, page numbers. Transport admitted that it was contractually obliged to permit the Trustees to conduct an audit. However, it contended that the Trustees exceeded the "scope of their authority" by requesting records for employees not concededly "covered" by the NMFA. The district court rejected this argument. The Sixth Circuit agreed with Transport.

Pension Fund) and a Joint Application (pertinent to the Health and Welfare Fund) wherein the company reaffirmed its commitments (*see* App. A P.C., A 4).

Article III, Section 5 (sentence two) of the Trust Agreements provides: "The Trustees may by their representatives examine the pertinent records[7] of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust" (App. A P.C., A 5-6; App. F P.C., A 46). Pursuant to this provision, Central States sent Transport an "audit engagement letter" on December 5, 1979 (App. B; *see also* App. A P.C., A 6-7). This was the first time the Trustees of Central States attempted to examine Transport's records (Appellees' Brief, p. 9; D-8, p. 5), and they had *no particular cause* to believe Respondents were in violation of ERISA or their collective bargaining agreements. In other words, Transport had been selected for a routine random field audit covering the period 1977-1979.

The audit began on February 4, 1980. All requests for information, records and documentation had to be addressed to one Mr. Robert Sigler, "Director of Payroll of each Defendant company" (App. H P.C., A 85, 89). Notwithstanding the fact that Transport consisted of 16 *trucking* companies under contract with the *Teamsters*, Mr. Sigler asserted, *without any substantiation*, that 60% of the Respondents' "employees" were not "covered" by the NMFA, had not "consented to" the production of their records, and were not subject to the Trustees' audit. The Sixth Circuit accepted Mr. Sigler's allegation on its face, as if it had been an established fact (App. B P.C., A 16). In reality, one of the *express purposes* of the audit requested would have been to *verify* this allegation. However, Mr. Sigler unilaterally refused to authorize the production of *any* of these records on the *unverified and untested conten-*

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[7] "Pertinent records" for audit purposes include complete payroll registers or payroll summaries (covering *all* employees), IRS 941 FICA quarterly earnings reports, IRS W-2, W-3, W-4, and 1099 forms for all employees, check registers, drivers' logs, trip manifests, contracts with independent contractors, leases with all owner-operators, bills of lading, detention records, employees' time cards, and personnel files (with such sensitive items as medical records or personal family data deleted). Central Transport has stipulated to the entry of an injunction requiring it to preserve these (and other specified) records pending the outcome of the appeal and the eventual completion of the audit (D-38, 44).

tion that such persons, not being "covered" by the NMFA, could *never* be eligible for benefits from Central States and that the records were confidential (Sigler Aff., App. H P.C., A 94). The district court rejected this position (App. A P.C., A 10-12); the court of appeals reversed.

Transport not only refused access to payroll records and other pertinent data for this group of employees; Transport also denied access to any documents relevant to *concededly covered employees* if such document *also* contained information concerning *allegedly noncovered* employees. It thus refused to produce (except for one three-month period in 1977) IRS 941 quarterly earnings forms, although tax forms are a reliable source for the independent verification of employee earnings (Sigler Aff., App. H P.C., A 93-94). Transport did little more than produce documents already in Central States' possession as well as an "insurance exception listing." (This is a document generated by the employer listing those individuals and time periods for which Transport *concedes* its legal obligation to the Funds. *See* Pasia Aff., App. H P.C., A 85-87. The employees on this list are those *ineligible* for the company's own pension plan *as determined by the company*. Absent a clerical error, this list would "match" any payroll ledgers for *concededly covered employees*.)

The auditors were requested to leave the premises on March 28, 1980 although the audit was incomplete both as to the records produced and companies audited (*see* O'Sullivan and Pasia Aff's., App. H P.C., A 83, 88).

On the basis of an incomplete examination of the records only of *concededly covered employees*, the auditors determined that Transport engaged in four kinds of underreporting, resulting in the following alleged delinquencies: at least $172,303.50 to the Pension Fund and at least $96,059.00 to the Health and Welfare Fund (O'Sullivan Aff., App. H P.C., A 83-84).[8] The court of appeals referred to

[8] "Late activation" (failure to report newly hired employees after the 30-day waiting period); "early termination" (reporting premature termination dates with concomitant failure to remit contributions for weeks worked); failure to remit required contributions for certain employees on sick leave; failure to remit contributions for certain employees who worked part of a week during which there was a strike. Audit findings represent only potential liability. These figures are subject

(Footnote 8 continued on Page 9)

these sums as *mere* "instances of underreporting" (App. B P.C., A 17, 30) and did not regard a general audit as justified, reasonable or prudent in view of these results.

The auditors also discovered that four employees on whose behalf Transport *was* remitting contributions were not listed on the payroll pertaining to covered employees. Instead, they were listed on the office payroll (Pasia Aff., App. H P.C., A 87). There was no explanation why these employees were entitled to contributions when the NMFA did not "cover" office personnel. Transport also refused to produce the office payroll register so that Central States could discover whether any other reporting discrepancies existed. Because the coverage status of these employees was unclear, the court of appeals expanded the scope of the audit to include the records of *these four employees*, but nevertheless asserted that general audits were arbitrary and capricious notwithstanding the fact that this kind of reporting discrepancy *illustrated* just how covered employees could be placed on an office payroll and shielded from the eyes of the auditors in accordance with Respondents' theory of confidentiality.

It is important for this Court to be completely clear that Central States' audit of Transport was not "triggered" by any of the above findings, as the court of appeals erroneously concluded (App. B P.C., A 17, 30); these findings were the *result* of a random *limited* audit. Moreover, in order for the above events to be meaningful, some indication of the statutory context is necessary as are some facts concerning the internal operation of the Central States Funds and the function of audits, which facts were presented to the courts below.

3. Statutory context

In 1974, Congress enacted ERISA in an attempt to prevent the great personal tragedies that had occurred in the past when employees reached retirement age only to discover that the benefits they had worked for and expected

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(Footnote 8 continued from Page 8)

to a consensual process of conciliation between the Funds and Transport or to further judicial proceedings in which Central States, as Plaintiff, will have the burden of proving Transport's liability. Audits can also result in a credit to the employer's account, possibly even to a return of contributions mistakenly made. 29 U.S.C. § 1103(c)(2)(A)(ii).

were not available due to careless trust administration and improper funding and vesting practices.[9] Among the goals to be promoted by the new Act were: the establishment of "standards of conduct, responsibility and obligation for the fiduciaries of employee benefit plans; adequate disclosure to participants; and adherence to minimum funding and vesting standards (29 U.S.C. § 1001).

Under ERISA, the trustees of such plans were given "exclusive authority and discretion to manage and control the assets of the plan" (29 U.S.C. § 1103), and "trustee responsibilities" were generally conceived to be "nondelegable" (29 U.S.C. § 1105). While the details of trust administration were to be set forth in mandatory written trust instruments (29 U.S.C. § 1102), the trustees were subject to an overriding statutory obligation to act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" (29 U.S.C. § 1104(a)(1)(B)).

ERISA requires pension plans to award credit to "participants" on the basis of "hours of service". A "year of service" leading toward the vesting of benefits is a calendar year, a plan year, or any consecutive 12-month period designated by the benefit plan in which a participant has completed *1,000 hours of service* (29 U.S.C. § 1052(a)(3)(A) and (C) and 29 U.S.C. § 1053(b)(2)(A)). These computations *must* include any hour for which an employee is directly or indirectly paid, or *entitled to payment* by an employer participating in a pension plan (29 C.F.R. § 2530.220b-2(a)(1) and (2)). Indeed, Advisory Opinion 76-89 issued by the DOL expressly states that credit must be given "*solely on the basis of service performed for a participating employer, regardless of whether that employer . . . has made or defaulted on his required contributions*" (31 August 1976, BNA *Pension Reporter*, No. 221, Jan. 8, 1979, emphasis added; *see* App. G P.C., A 70-74).[10]

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[9] *See Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374-375 (1980); *PBGC* v. *R.A. Gray & Co. (No. 83-245)*, 52 U.S.L.W. 4810 (June 18, 1984).

[10] The Sixth Circuit acknowledged that benefits are not contingent on employer contributions in *Van Gunten* v. *Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586 (6th Cir. 1983).

Regulations promulgated pursuant to ERISA permit pension plans to employ "functional equivalents" to the "1,000 hour rule" noted above. 29 C.F.R. § 2530.200b-3(a) and (e). Central States has employed a "functional equivalent" based on full weekly contributions since its establishment in 1955 (D-8, p. 3). Twenty weeks of contributions entitle a participant to one year of *vesting* credit and one-half year of credit toward a twenty-year retirement benefit. An employer must remit a full weekly contribution if a participant has worked any part of the week. By the same token, the participant must be given a full week of credited and funded service by Central States regardless of the absence of employer contributions (D-8, p. 3). This funding practice makes the accuracy of employer reporting all the more important. Conversely, omissions cause a greater potential drain on fund assets and hence require greater Trustee vigilance directed toward their prevention.

Significantly, Section 209 of ERISA (29 U.S.C. § 1059) requires *employers* to "maintain records with respect to each of his *employees* sufficient to determine the benefits due *or which may become due to such employees*" (emphasis added). Unlike records supporting documents required by *plans* to be filed with the DOL and the IRS (29 U.S.C. § 1027), there is no six-year guideline for the retention of *employee* records by *employers*, since vesting and eligibility questions often involve much longer time frames.[11]

Finally, ERISA requires trustees to provide participants with Summary Plan Descriptions. In addition, benefit status reports must be provided at least once a year if requested. 29 U.S.C. §§ 1021, 1022, 1024, 1025; App. G P.C., A 56-66.

Pursuing the goals set forth in ERISA and carrying out the tasks imposed upon them, the Central States Trustees determined on the basis of years of experience in trust administration that random general audits of participating

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[11] Sections 3(6) and 3(7) of ERISA (29 U.S.C. § 1002(6), (7)) define, respectively, the terms "employee" and "participant." "The term 'employee' means any individual employed by an employer." "The term 'participant' means any employee or former employee of an employer . . . *who is or may become eligible* to receive a benefit of any type *from an employee benefit plan which cove s employees of such employer* . . ." (emphasis added).

employers' tax and payroll records[12] are the single most reliable and effective means of uncovering delinquent contributions and identifying employees potentially eligible for service credits, plan benefits and disclosure. Audits, of course, also reveal the presence of *ineligible* persons for whom contributions should not have been made or accepted. For actuarial reasons, it is important for the Funds to discover this class of individuals too. Significantly, the DOL and the IRS have approved field audit programs (Reg. 76-1, 41 F.R. 12740; March 26, 1976).

4. Central States' audits and their function

An employer's obligation to contribute to Central States is established in the collective bargaining agreement, which the Trustees have no role in negotiating. The employer and the union determine which job classifications will be covered. The Funds prepare a schedule of benefits which specified contribution rates can provide. The employer and the union select the benefits and rates they can afford. Upon contractually agreeing to participate in the trusts, the employer submits a list of employees "covered" by the collective bargaining agreement and "eligible" for contributions, *supra*, fn. 5. Initially verified by the local unions, this list constitutes the "base group." Thereafter, Central States must rely on the employer to accurately report fluctuations in the base group, for example, by adding newly hired "covered" employees as well as by reporting terminations (App. A P.C., A 6).[13]

[12] As used herein, a "random" audit means one in which an employer is selected without any reason to believe it is not reporting correctly. The employer does receive prior notice of the audit through an "engagement letter" from the Funds. The term "general" audit means that the Funds request access to pertinent records relating to the employer's complete work force, subject to safeguards to protect confidentiality. *Infra*, pp. 14, 15, 16, 31, 45.

[13] *See U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir. 1983). Here, the Sixth Circuit acknowledged that "Employee Billing Changes and Corrections" forms and "Monthly Contribution Reports" submitted by employers, respectively, to the Central States Pension and Health and Welfare Funds, "constitute the primary source, if not the sole source, available to trustees of pension and welfare funds with respect to the names of the employees covered and the amount of contributions made by employers." Defendants were convicted under 18 U.S.C. § 1027 for making false statements on these reports. Some of the reporting discrepancies were uncovered by a prior Central States audit.

Because of the size of the Funds and the geographical distribution of their constituency, contributions are remitted pursuant to a system of self-reporting, i.e., an honor system. Approximately 12,000 employers with employees in 40 states contribute to the two Funds pursuant to thousands of different collective bargaining agreements executed between themselves and Teamster Locals (App. B P.C., A 30). Since the Central States Funds are based in Chicago, Illinois, there is no way for the Funds to physically monitor employer reporting absent a field audit program, and to verify that the reported amounts are correct.

While many employers report correctly, substantial discrepancies do occur, typically, underreporting and nonreporting. An employer who "underreports" fails to contribute appropriately on behalf of employees he *concedes* are covered by the collective bargaining agreement and whom he has at some time reported to the Funds, whether by including them in the base group or by subsequently adding their names on monthly reporting forms. An audit of the records of concededly covered employees can detect this kind of misreporting. Such an audit of Transport revealed underreporting in the alleged amount of $268,362.50.

An employer who engages in the practice of "nonreporting" simply omits covered employees from the base group and never subsequently reports them to the Funds, thus eroding the actuarial solvency of both Funds and potentially increasing the unfunded vested benefits liability of the Pension Fund.[14] Audits of the records only of concededly covered employees (as mandated by the court of appeals) clearly cannot detect or remedy nonreporting.

Numbers best illustrate the magnitude of the problem of nonreporting. If only 10% of the 12,000 employers in the pool omit only one single employee from their contribution reports, the annual loss of income to the Pension Fund would be approximately $3,120,000.00 ($50.00 per week per employee × 52 weeks × 1,200 employers) (Petition for Rehearing *en banc*, p. 10).[15] Multiply even a fraction of this

[14] *See* Petition for Certiorari, p. 8, fn. 7 for a discussion of the impact of misreporting on a plan's underfunding.

[15] This formula assumes a weekly contribution rate of $50.00. Many employers, including Respondents, contribute pursuant to the NMFA. The current contribution rate under this contract is $55.00. *See* Brief of Amicus Arthur Young in Support of Petition, p. iv, v, 17.

figure by 2,000 pension funds in the United States and the potential net loss is staggering.

Fund audits are designed to intrude as little as possible on privacy rights, and "pertinent records" relating to allegedly "noncovered" employees are limited in the typical situation. However, as a general rule, access to complete payroll registers and IRS 941 forms is a minimum requirement for an independent audit. Indeed, the auditor's first objective is to assure himself that he is looking at an employer's "complete" employee population. If separate payrolls are kept, the auditor generally totals up the individual records and compares these totals with the gross payroll figure listed on the 941 tax form prepared quarterly for FICA purposes to document the employer's withholding tax liability. At this stage of the audit, *the dollar totals* are most important. Therefore, the auditor may, to accommodate confidentiality interests, permit the employer to delete the dollar figures entered for named individual corporate officers, providing that the employer adequately documents the identity of these individuals as officers. If a discrepancy exists between payroll totals and the 941 figure, further investigation is necessary. For, unless a clerical error can be shown, the suspicion naturally arises that additional payrolls exist and that people listed on an omitted or "ghost payroll" may be doing bargaining unit work. There is also the possibility that cash disbursements have been made.[16]

IRS 1099 forms (nonwage income) must also be investigated. An unusual amount of income reported on a single

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[16] *See* Petitioners' Supplemental Brief, p. 3 and Appendix (N.Y. Times, July 6, 1983: cash disbursements allegedly responsible for defrauding certain employee benefit trust funds of more than ten million dollars). An inquiry made subsequent to the filing of that Brief revealed that one of the construction companies under investigation, Prince Carpentry Inc., and its principals pled guilty to a six-count information charging conspiracy to defraud, mail fraud, and filing false corporate tax returns and agreed to pay the affected employee benefit funds $320,000.00 in back contributions on behalf of those covered employees who had been paid "off the books" in cash. *U.S.* v. *Prince Carpentry, Inc., et al.*, 84-188 (E.D.N.Y., March 20, 1984). The defendants' scheme, as shown by the information and a transcript of the guilty pleas, was that the company failed to report all employee work history and paid cash salaries to employees who were willing to work for a lower, but unreported wage. The case is significant not only with respect to the magnitude of the *employer's nonreporting;* it also shows how *employees* could be induced *not to report a company's fraud to the benefit funds* affected either out of ill-conceived self-interest or legitimate fear.

1099 form or the presence of a significant number of 1099 forms may raise a question of coverage, depending on the name which appears on the form and the type of company being audited.[17] For example, lessors of trucks receive 1099 forms reflecting rental income. If a lessor also drives his truck and is a bona fide independent contractor, the 1099 form will also reflect his earnings as a driver. However, lessor-drivers or "owner-operators," as they are known in the industry, may be "employees" and hence "covered" by the collective bargaining agreement depending on the regularity of employment and the degree of control of the carrier. Moreover, under the NMFA, while subcontracting is permissible under specified conditions, subcontracting on a regular basis may trigger contract wages and other terms and conditions of employment, including pension and health and welfare benefits. Access to complete records is particularly critical in this area.

If the payroll and 941 totals match, and there are no problems with the 1099 forms, the auditor spot-checks personnel files of allegedly noncovered employees. If it appears that employees listed on the payroll for noncovered employees do not in fact perform bargaining unit work, that is the end of the audit as far as this group is concerned. Even with regard to the covered employees, the audit is limited to essential records: if two documents verify the accuracy of reporting, four will not be demanded.

Substantial safeguards are also offered to protect confidentiality.[18] However, in accordance with generally accepted auditing standards which require at least some independent verification,[19] the audit cannot be limited solely to *employer-selected* records of one segment of its work force, for example, the records of those employees the employer *concedes* are covered by the collective bargaining agreement. If limited only to these records, the Trustees might

[17] Clearly, if the name of an attorney or a plumbing company appears on a 1099 form contained in the records of a trucking company signatory to the NMFA, the auditor can reasonably assume that no such coverage issue will be involved.

[18] The safeguards enunciated in *Central States, Southeast and Southwest Areas Pension Fund* v. *Theut Products*, No. 82-71080 (E.D. Mich. 1982), are standard (App. I P.C., A 96-99).

[19] *See*, for example, SEC Accounting Release No. AS-19; CCH Fed. Sec. Laws Repts. § 72,020 and *infra*, fn. 41, p. 41.

never discover the existence of covered employees the employer did not report in the first place, or they might discover them only at some later time when the employer was already out of business or bankrupt or after the statute of limitations had run, thus precluding a recoupment action as suggested by the court of appeals (App. B P.C., A 34).

5. Proceedings below

Carefully analyzing the language of various provisions of the Trust Agreements which afford the Trustees both specific powers and broad managerial discretion, the district court found that the Trustees had a contractual right to audit records relating to the employer's entire work force, and that this right would be enforced unless Transport could show an overriding interest in confidentiality (App. A P.C., A 10). In light of the safeguards offered by Central States and the relevance of the records for the purposes requested, the court found that on balance the Trustees' need for information outweighed the employer's interest in confidentiality (*id.*, A 11-12). The court then determined that ERISA supported the Trustees' request for records and that the audit demanded was neither arbitrary nor capricious (*id.*, A 12-13). Transport was ordered to produce the records requested, and the court refused to certify its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Although the district court's opinion was rendered in the context of cross-motions for summary judgment, both parties having agreed that there was no genuine issue as to any material fact, Transport filed an appeal under 28 U.S.C. § 1292(a)(1).

The court of appeals took jurisdiction and reversed, finding neither a statutory nor a contractual basis for random general audits. While the court acknowledged that "the trustees must ensure that contributions to the Funds correlate with the disbursement of benefits from them" (App. B P.C., A 29), and that "entitlement to Funds' benefits . . . may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee," it nevertheless restricted audits to the records of concededly covered employees and to the records of *particular individuals* as to whom the Trustees had established *reasonable cause* to believe they were covered re-

gardless of how they were classified by the employer or the Union. The court did not explain how such "reasonable cause" could be established absent antecedent production of records relating to a complete "employee universe" as this term is understood by accountants.

Completely misapprehending the purpose of the audit, as noted above, the court reasoned that on the basis of apparent "instances of underreporting for covered employees" (more than a quarter of a million dollars!) and "the receipt of monies for four employees whose coverage was not disclosed by the Union seniority list, Transport, or the Union," it would be "arbitrary and capricious" to audit "the records of all of Transport's employees" (*id.*, A 30); indeed, the court stated that no "prudent man" would authorize such an audit, if only because of the "expenses" involved (*id.*). In so concluding, the court appeared to elevate the cost factor above all other components of a "prudent" trustee decision (29 U.S.C. § 1104) and did so *without any evidence of the cost of this particular audit or of audits in general.*[20]

The court accepted as a fact that the majority of Transport's employees were not covered by labor agreements. However, there is *no* evidence in the record that this "fact" had been established or agreed to by Petitioners (*id.*, A 30). Nevertheless, the court objected to the Funds' audit on confidentiality grounds without addressing the relevance of the records for the purpose requested or the safeguards offered to protect privacy interests (*id.*, A 30). In contrast to the district court, the Sixth Circuit also rejected Central States' analogy to NLRB disclosure standards.

The court also noted, without citing *any* authority, that the Funds would be adequately protected through the efforts of the Union and the Secretary of Labor or of employees themselves.

Finally, the court limited the scope of the audit by narrowly construing the "Production of Records" provision of the Trust Agreements, substituting its own "wisdom" for

[20] There is absolutely no evidence in the record as to the cost of the audit either to Central Transport or, more importantly, to the Funds. This is very significant since the panel found that random general audits would be contrary to ERISA because of their *cost*; the suggestion is that such audits would be a waste of Fund assets and, for *this reason*, arbitrary and capricious. *Id.*, A 30.

the "discretion" of the Trustees, although the Trustees have plenary power to interpret the Trust Agreements and although their interpretation was both grammatically and logically reasonable as well as consistent with prior practice and good faith. Having narrowly interpreted this document so as to eliminate a *contractual* basis for the audit, the court was able to eliminate a *statutory* basis by stating that the nature and scope of the Trustees' fiduciary obligations under ERISA are limited by plan *documents* which in this case refer only to "covered employees." The court thus reached the clearly erroneous and circular result that absent *reasonable cause* to believe *particular* individuals were improperly omitted from coverage, the Trustees could *verify* the accuracy of *employer* reporting only by reviewing the records of employees the *employer conceded were covered*! This error was compounded by the clear suggestion that random audits that go beyond the records of concededly covered employees are *per se* arbitrary and capricious because they are too costly and too intrusive. Hence, even if a Trust Agreement spelled out in explicit detail the kind of audit requested by the Central States Trustees under the phrase "pertinent records," such a procedure would still be unenforceable as contrary to ERISA and public policy.

Central States therefore seeks a ruling not only that the Trust Agreements in their present form and as interpreted by the Trustees permit random general audits, but that *ERISA independently* permits trustees of employee benefit funds to request access to complete employee records, subject to safeguards to protect confidentiality, in order to verify the accuracy of reporting, to deter evasions, and to identify all eligible plan participants without the aid or intervention of third parties.

SUMMARY OF ARGUMENT

The issue in this case is whether trustees of multi-employer employee benefit funds may request access to complete employee records, subject to safeguards to protect confidentiality, when conducting random audits to verify the accuracy of reporting.

I.A. The trustees of Taft-Hartley funds have the right, under ERISA, to conduct surveillance audits and to request complete verification data in accordance with 29 U.S.C.

§ 1104(a)(1)(B), the "prudent man" rule. When Congress enacted ERISA in 1974 in order to protect the security and well-being of millions of American workers, it gave plenary powers to the trustees of employee benefit funds. Because the funds subject to the statute differed so greatly, Congress refrained from setting forth a detailed list of specific trustee powers. Instead, the legislature drafted a few affirmative duties and a few express prohibitions and generally contemplated that Trustees would act in accordance with common law principles of trust which would offer great flexibility and yet provide such established curbs on trustee action as good faith, reasonableness, and consistency. At the heart of the statute is merely a general mandate: trustees must act *solely* in the interests of participants and beneficiaries *and* with that degree of care, skill, diligence and prudence that is appropriate in the circumstances.

Under ERISA and corresponding regulations, trustees nevertheless have an *express* duty to collect contributions from employers, grant vesting credit and pension benefits to all eligible employees regardless of whether or not their employers have made corresponding contributions, and to provide Summary Plan Descriptions and benefit status reports to plan participants and beneficiaries. Under ERISA, as under the common law of trusts, trustees have *implied* powers to achieve *express* objectives. Audits are the *ordinary and natural means* for ascertaining and collecting contributions; for preventing a drain on fund assets by correlating disbursements from and contributions to the funds, and for identifying all eligible participants to whom a duty of disclosure is owed. *Random* audits enable the Trustees to implement the above objectives more effectively.

Access to *complete* records is dictated by the fact that meaningful audits require independent inquiry and independent verification of data. Central States, like the federal tax system, operates on a self-reporting basis. In policing this system, the Trustees cannot reasonably rely on the representations of the employer that employees who are *concededly covered* are the *only* employees who do, *in fact*, perform bargaining unit work and are therefore eligible for contributions.

Case law indicates that those charged with enforcing the Internal Revenue Code and the Fair Labor Standards Act are not required to accept the representations of the subject of the inquiry. *U.S.* v *Bisceglia*, 420 U.S. 141 (1974); *Fleming* v. *Montgomery Ward Co.*, 114 F.2d 384 (7th Cir. 1940). Nor are they subject to a cause standard. *U.S.* v *Powell*, 379 U.S. 48 (1964); *Oklahoma Press Publishing Co.* v *Walling*, 327 U.S. 186 (1946). Employee benefit funds, though private, are sufficiently affected with national public interest to permit their trustees, as federal fiduciaries, to enjoy similar investigative latitude commensurate with the nature of their task so long as they can provide safeguards to protect confidentiality.

In the area of employee benefits, post-ERISA case law suggests that the Sixth Circuit's limited audit/reasonable cause standard is unworkable and would not reveal misreporting 1) under prehire contracts, *McNeff* v. *Todd*, 103 S. Ct. 1753 (1983); 2) where an employer contests coverage under a collective bargaining agreement, *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983); *Laborers* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983); 3) where an employer claims that an individual is an independent contractor, *Trust Fund* v *Hawg N. Action*, 651 F.2d 1384 (10th Cir. 1981); 4) where a collective bargaining agreement provides for contributions *measured by hours* of covered work performed by employees of a nonsignatory employer, *Walsh* v. *Schlecht*, 429 U.S. 401 (1977); and 5) where the collective bargaining agreement has been orally modified by the employer and union, *Waggoner* v. *Dallaire*, 649 F.2d 1362 (9th Cir. 1981). In such situations, employers, like Transport, would simply withhold the records of anyone not *concededly* covered. Thus, absent consensual access to complete records, trustees will have no alternative but to compel records through discovery, although increased litigation will have an adverse impact on the courts, on funds, and on the employers themselves. And, should courts not grant access to pertinent records through discovery, the Sixth Circuit will have created a privilege not countenanced by the Federal Rules of Evidence. Those who will ultimately suffer will be honest employers as well as participants and beneficiaries on whose shoulders funding gaps will fall.

I.B. This Court has made it unambiguously clear that Congress intended employee benefit trust funds to be independent from unions, that trustees are neutral fiduciaries and not part of the collective bargaining process, and that trustee powers set forth in properly executed trust agreements should not be lightly eroded. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *Schneider Moving & Storage, et al.* v. *Robbins, et al.*, 104 S. Ct. 1844 (1984). Under ERISA, trustees have a *nondelegable* fiduciary duty to conduct audits and collect contributions. 29 U.S.C. § 1105; *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981); *Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 EBC 1726 (D.D.C. 1982). The Sixth Circuit, in limiting the scope of Central States' requested audit of Transport, stated that the Funds would be adequately protected by the efforts of unions, employees themselves, and the Secretary of Labor. There is no authority to support this proposition, which is also in evident conflict with the spirit of the LMRA, ERISA, and the rationales of leading cases of this and other courts. It would be *quintessentially imprudent* for trustees to rely on third persons to monitor their self-reporting system since the persons recommended by the court of appeals 1) may have competing interests; 2) may lack sufficient knowledge to perform the task; and 3) may lack the physical or financial capability to do so. It would be *fundamentally unfair* to place the burden on employees since it is *employees* ERISA was enacted to protect in the first place!

I.C. ERISA requires employee benefit plans to submit annual financial reports which must be audited by an independent CPA in accordance with generally accepted auditing standards. A primary objective of the financial statement and the audit is to assure that the materials fairly present the ability of the plan to pay benefits when due. If a plan has an internal field audit program which itself operates in accordance with accepted procedures, this gives rise to an assumption that employers are generally complying with their contribution obligations and are reporting participants correctly. In such a case, the field audit program functions as an "internal accounting control" serving to authenticate the accuracy of the financial statements. Central States' independent auditor has approved of and relies

upon the Funds' internal field audit program. It has publicly stated that it could *not* rely on audits conducted in accordance with the Sixth Circuit's scope limitation. The Trustees would be *imprudent* if they failed to conduct audits in accordance with generally accepted standards which external accountants also utilize and upon which they rely.

II. The Sixth Circuit imposed a cause standard and therefore a scope limitation on Fund audits in accordance with its notions of confidentiality. In so doing, it rejected disclosure principles which have evolved under the NLRA in order to permit unions to perform their representational duties effectively. The key to disclosure under the NLRA is relevance. The Trustees have shown that the purpose of their inquiry is legitimate, that the manner of their inquiry comports with generally accepted auditing standards, that the materials requested are not only relevant to the inquiry but not reasonably accessible except from the employer, that safeguards exist to protect confidentiality, and that breaches of confidentiality are remediable. The Trustees' field audit program is a prudent method of enforcing ERISA. Unless the Trustees are granted access to an employer's complete employee records, no one will be able to conduct adequate surveillance audits and irreparable harm will be done to the Funds and their participants. Since, on balance, it is clear that the Trustees' need for information outweighs the employer's interest in confidentiality, the liberal discovery-type standard applicable under the NLRA should be equally applicable to ERISA. It is only in this way that the Trustees' will be able to perform their fiduciary duties effectively.

III. The Trustees have a *contractual* right to conduct the audit requested. Article III, Section 5, sentence 2 of the Trust Agreements governing the Funds *expressly* authorizes the Trustees to conduct on-site audits of an employer's "pertinent records." The Trust Agreements also authorize the Trustees to construe the provisions of these instruments and, as this Court recognized in its *Schneider* opinion, *supra*, all such constructions made in good faith are binding. The Trustees have always construed the term "pertinent records" to mean the tax, payroll, and related data necessary to conduct a professionally acceptable audit. This requires access to records concerning the *entire employee*

population. The Sixth Circuit translated the phrase "pertinent records" into the phrase "employee records" and then further limited the word "employee" so as to mean "concededly covered employee." The court of appeals substituted its own interpretation for that of the Trustees and hence departed from the proper standard of judicial review. Transport *contractually* agreed to comply with the terms of the Trust Agreements, including the Trustees' constructions thereof; the Trustees' interpretation was reasonable, logical, consistent, and made in good faith. In conducting random general audits, the Trustees seek only to *establish for themselves* that all employees performing bargaining unit work are receiving appropriate contributions. The Sixth Circuit's construction of the Trust Agreements and the audit function is clearly erroneous.

ARGUMENT

I. ERISA PERMITS TRUSTEES OF MULTIEMPLOYER PLANS TO CONDUCT RANDOM GENERAL AUDITS TO VERIFY THE ACCURACY OF REPORTING AND TO IDENTIFY ALL ELIGIBLE PLAN PARTICIPANTS

I.A. Random general audits are "prudent" within the meaning of 29 U.S.C. § 1104

I.A.1. Trustees have express and implied powers under ERISA as under the common law; the right to audit is an implied power

Audits and accountings are routine trustee activities.[21] Nevertheless, they are *specific* to particular purposes and situations and hence unsuitable for explicit, detailed, and generally applicable statutory formulation. Thus, it is not surprising that the court of appeals failed to find an express provision in ERISA authorizing and setting forth a procedure for the conduct of "complete" audits. Having recognized that employee benefit funds differ from each other in

[21] Bogert, *The Law of Trusts and Trustees*, Chap. 46, *Accounting and Compensation* (rev. 2d ed. 1980). In the context of employee benefit trusts, the trustees' right to audit contributing employers' records was rarely challenged prior to 1980. (*see* Appellees' Brief, pp. 22-26, and cases cited therein.) Transport itself conceded that there was a *single* case on point: *Central States, et al.* v. *CRST*, 641 F.2d 616 (8th Cir. 1981). *CRST* was substantially overruled in *Robbins* v. *Prosser*, 700 F.2d 433 (8th Cir. 1983), aff'd, 104 S. Ct. 1844 (1984).

many respects, the drafters of ERISA refrained from setting forth a comprehensive list of specific acts which trustees were required to perform in order to fulfill their statutory fiduciary obligations and effectively administer the assets committed to their care. Instead, ERISA contains a few affirmative duties[22] and a few specific prohibitions (29 U.S.C. § 1106), and leaves the details of trust administration to be articulated in mandatory written trust agreements, specific to each fund.

Nevertheless, 29 U.S.C. § 1104 is a core provision of ERISA and sets forth the fiduciary obligation and prudent man rules of the statute, which provide the measure by which Trustee activities must be gauged where an act is neither expressly commanded nor expressly prohibited.

In formulating this overriding provision, however, Congress purposefully painted with a broad brush. This is because ERISA was intended to codify "principles applicable to the law of trusts." 3 *U.S. Code Cong. & Ad. News* 5186 (1974); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *Robbins, et al.* v. *Prosser's Moving & Storage Co. and Schneider Moving & Storage Co.*, 700 F.2d 433, 439 (8th Cir. *en banc*, 1983), *aff'd*, 104 S. Ct. 1844 (1984). As Congress recognized, trust principles permit a maximum of flexibility and discretion while affording such well-established curbs on trustee conduct as good faith, reasonableness, and consistency.[23]

Under the common law of trusts, trustee powers are of two classes: express and implied. *Express* powers are those which are granted and set forth in trust instruments or statutes; *implied* powers are those which are inferred therefrom because they are necessary or appropriate for carrying out the *express* purposes of the trust. Section 3(a) of the 1964 Uniform Trustees' Powers Act provides:

From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to

[22] For example, the duty to file annual reports (29 U.S.C. §§ 1023, 1024); to furnish participants with Summary Plan Descriptions (29 U.S.C. §§ 1022, 1024, 1025); to diversify investments (29 U.S.C. § 1104(a)(1)(C)); the duty to retain records (29 U.S.C. §§ 1027, 1059).

[23] While ERISA imposed more stringent fiduciary standards on trustees of employee benefit plans, case law antedating passage of the statute had long since indicated that pension and welfare plans were to be regarded as common law trusts and their trustees as fiduciaries. *See Kosty* v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1963).

> perform without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection c [express powers].[24]

This has been construed to mean that a trustee has certain "inherent" powers which are implied from his office. *See* Bogert, *The Law of Trusts and Trustees* § 551. Put differently, an "implied" power is one which can be regarded as the *ordinary and natural means for obtaining an express and intended result* (*id.*, p. 41).

The authority to audit employer records may be implied or inferred from several express provisions of ERISA and/or corresponding regulations. In the first place, 29 U.S.C. § 1103 grants trustees "exclusive authority and discretion to manage and control fund assets". To this end, trustees have the unquestionable power, both express and implied, to *collect* delinquent contributions. Indeed, failure to do so through negligence or complicity would be a "breach of fiduciary duty" under 29 U.S.C. § 1104 and a "prohibited transaction" under 29 U.S.C. § 1106.[25] In enacting 29 U.S.C. § 1145 and 29 U.S.C. § 1132(g)(2), Congress *expressly* intended that *employers* adhere to their contribution obligations as set forth in collective bargaining agreements or multiemployer plans and that *trustees* enforce such contracts and plans, providing plans with stringent make-whole remedies for successful enforcement. An audit to encourage employer compliance, to verify the accu-

[24] Although the Uniform Trustees' Powers Act does not purport to cover employee benefit trusts (Section 1, Definitions), it contains a "prudent man" rule similar to, though less stringent than, that set forth in 29 U.S.C. § 1104. The Act is therefore relevant to the common law basis of ERISA.

[25] It is a "prohibited transaction" to extend credit to a "party in interest" or to allow fund assets to remain in the hands of such party for his use or benefit (29 U.S.C. § 1106(a)(1)(B) and (D). An employer, any of whose employees are covered by an employee benefit plan is a "party in interest" (29 U.S.C. § 1002(14)). Contributions owed under collective bargaining agreements but not paid are fund assets (*see* DOL Advisory Opinion, 78-28 (App. G P.C., A 73). DOL Reg. 76-1 (41 F.R. 12740) also makes clear that trustees may breach their fiduciary duties and commit a prohibited transaction if they fail to maintain orderly and systematic procedures for the determination and collection of employer contributions. Claims may be compromised only for prudent business reasons, taking into account the legal merit of the claim, the potential cost of collection relative to the amount in controversy, and the ability of the employer to pay if a judgment is rendered.

racy of reporting, and to determine whether any amounts are delinquent is the *ordinary and natural means* for implementing the express power to collect.

Pension plans are also *expressly* required to award vesting service credit and benefits to eligible participants based on hours worked in covered employment *regardless of employer contributions*. An audit is the *ordinary and natural means* for "correlating" disbursements from and contributions to pension funds, a duty which the Sixth Circuit perceived without approving the method selected by the Trustees to prevent a drain on fund assets and an increase in unfunded vested benefits liability.

The trustees of multiemployer plans are also *expressly* required to provide Summary Plan Descriptions to eligible plan participants (29 U.S.C. §§ 1022, 1024). Moreover, they must provide them with benefit status reports once a year upon request (29 U.S.C. § 1025). An audit is the *ordinary and natural means* for identifying eligible plan participants with a view toward informing them of their statutory rights. To the extent an employer engages in nonreporting (i.e., completely omits a covered employee from the "base group" and subsequent remittance forms), random general audits allow trustees to fulfill their disclosure obligations. There is no authority for the court of appeals' suggestion that an employee who *fails* to receive a Summary Plan Description or benefit status report should thereby be on notice to contact the Funds with regard to his or her coverage and eligibility and that failure to do so might create an estoppel in favor of the Funds. I *infra*, p. 39.

It is clear from the foregoing that benefit plan trustees have an *implied* statutory power to conduct an audit of some kind. The *permissible scope* of the audit, however, requires application of the "prudent man rule" (29 U.S.C. § 1104) taking into account such considerations as the purpose of the audit; the size of the fund; the type of industry or industries in which contributing employers are engaged; the type of jobs performed by participants (including such factors as transcience,[26] visibility, and potential overlap

[26] This is of particular importance in construction industries. *See* Amicus Brief of *Bricklayers, et al.*, pp. 4-5.

with noncovered work);[27] the nature of fund and/or employer recordkeeping; plan experience with regard to accurate reporting; and generally accepted auditing standards.

The type of audit at issue here is a "random audit."[28] Plan experience has generated the need for such periodic investigations: to deter evasions; to verify that all persons actually performing covered work are being reported; to enhance Trustee protection of the benefit status of every person entitled to coverage and disclosure under ERISA; to prevent reporting on behalf of ineligible individuals; to foster actuarial solvency; to prevent increases in unfunded vested benefits liability; to comply with standard auditing practices; and to assure that Trustees maintain an *independent* role in the administration of the trusts. The court of appeals was clearly erroneous in limiting the scope of the audit. Basic dictionary definitions of the word "audit" indicate that the Trustees' request for access to complete employee records, their healthy skepticism, and their refusal to rely exclusively on employer-selected and employer-generated documents was reasonable, logical, and practical — in a word, prudent.

I.A.2. Access to complete records is necessary for a genuine and independent audit given a self-reporting system: the IRS and FLSA analogies

Black's Law Dictionary defines an audit as follows: "Sometimes restricted to a mere mathematical calculation or process, but, in its generally accepted sense, includes an investigation and weighing of evidence and deciding of whether entries in books are true and correct." Webster's *New World Dictionary of the American Language* states that an audit is "a regular examination and checking of accounts or financial records." The *Oxford*

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[27] In the trucking industry, for example, a truck driver may be a "covered employee" or a noncovered "independent contractor owner-operator" depending upon the precise circumstances of his employment and the application of agency principles. Since "owner-operators" are typically dispatched from their homes and travel with full truck loads from shipper to receiver, their work is particularly invisible to the union.

[28] Most funds, including Central States, also conduct audits upon certain requests ("referral audits") as well as in conjunction with litigation to ascertain damages ("delinquency audits"). The same principles that apply to random audits apply *a fortiori* to cause-generated audits.

English Dictionary describes an audit as a "systematic examination of accounts, so as to ascertain their accuracy." An "auditor" is one who "verifies" the accounts of monies in the hands of others by reference to other documents. *Id.*

From the Funds' perspective, an audit is a fact-finding and verification procedure similar in purpose to that used by the IRS pursuant to 26 U.S.C. §§ 7601 and 7602 (App. C). Like the IRS, Central States cannot *rely solely* on the self-selected records of an employer who has been chosen for an audit. To state the obvious: "*An audit in order to be effective must be independent. The taxpayer* [and by analogy contributing employers] *cannot dictate what information is to be examined for mistake or evasion.*" *U.S.* v. *Davey*, 404 F. Supp. 1283, 1284 (S.D.N.Y. 1975, emphasis added).

In *U.S.* v. *Bisceglia*, 420 U.S. 141, 145-146 (1974), Chief Justice Burger described the audit function of the IRS in terms which are so pertinent to the issue at bar that Petitioners are unable to plead their request for access to complete employee records more eloquently than by quoting from the Court's Opinion in full:

> We begin examination of these sections [26 U.S.C. §§ 7601 and 7602] against the familiar background that our tax structure is based on a system of self-reporting. There is legal compulsion, to be sure, but basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability. Nonetheless, it would be naive to ignore the reality that some persons attempt to outwit the system, and tax evaders are not readily identifiable. Thus, § 7601 gives the Internal Revenue Service a broad mandate to investigate and audit "persons who *may be* liable" for taxes and § 7602 provides the power to "examine any books, papers, records, or other data which may be relevant . . . [and to summon] any person having possession . . . of books of account . . . relevant or material to such inquiry." Of necessity, the investigative authority so provided is not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax laws exists. *United States* v. *Powell*, 379 U.S. 48 (1964). The purpose of the statutes is not to accuse, but to inquire. Although such investigations unquestionably

involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records.

We recognize that the authority vested in tax collectors may be abused, as all power is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers.

Because of its size, Central States cannot operate other than through a system of self-reporting. Experience has shown that a significant number of employers do attempt to "outwit the system," that "evaders are not readily identifiable," and that the availability of criminal sanctions for misreporting (18 U.S.C. § 1027) does not have the deterrent effect that Transport would put forward as an alternative to complete Trustee audits.[29] To paraphrase *Bisceglia*, random general audits are "essential to [the] self-reporting system" of most multiemployer plans to "assure" that contributing employers "pay what Congress has mandated and to prevent dishonest persons from escaping their obligations," thereby "shifting the burden to honest" employers as well as to participants and beneficiaries who rely on the solvency of the pool.

In the employee benefits sphere, as in our tax system, a cause standard can only frustrate necessary investigative activity. Indeed, under *U.S.* v. *Powell*, 379 U.S. 48, 57-58 (1964), and its progeny, IRS audits (whether consensual or summoned) are considered justifiable if their purpose is legitimate, if the materials requested are relevant to the inquiry and not already in the possession of the government, and if administrative procedure is complied with. Petitioners submit that multiemployer employee benefit

[29] In early 1983, at the time the Sixth Circuit decided *Central Transport* and limited the scope of the audit, only *one* reported case existed in which an employer was convicted for falsifying reports to employee benefit funds. *U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir. 1983). Petitioners are not aware of a subsequent flurry of convictions for misreporting. (Only *one* has thus far resulted from the Drywall investigation, *supra*, p. 14, fn. 16). On the other hand, collection actions for delinquent contributions continue to be filed with regularity.

funds, while private, are affected with sufficient national public interest (29 U.S.C. § 1001(a)) to permit their trustees, as federal fiduciaries, to investigate employer records under *Powell*-type criteria, if the trustees act in accordance with systematic procedures[30] and protect confidentiality.

Significantly, in rejecting a "probable cause" standard for the enforcement of IRS summonses in *U.S.* v. *Powell*, *supra*, this Court drew an analogy to investigations pursued under the Fair Labor Standards Act, a statute whose remedial purposes and actual remedies closely parallel those of ERISA. Random general audits by benefit fund trustees are analogous, if not functionally equivalent, to the random inspection of records conducted by the Administrator of the Wage and Hour Division of the DOL pursuant to Section 11 of the FLSA. Courts construing the inspection powers of the Administrator have rejected most of the arguments raised by Transport and accepted by the Sixth Circuit. *See Fleming* v. *Montgomery Ward Co.*, 114 F. 2d 384 (7th Cir. 1940), *Cudahy Packing Co.* v. *Fleming*, 122 F. 1005 (8th Cir. 1941), and *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). These cases and their relevance to the issue at bar were discussed in the Petition, pp. 20-23. Two points deserve repetition. First, *in contrast to* the FLSA, Congress in enacting ERISA left the task of conducting routine audits primarily to fund trustees while assigning the DOL the responsibility for ensuring that the trustees perform their fiduciary duties (*infra*, p. 39-40). Second, trustees, *like the Administrator*, require access to complete employee records if they are to perform their duties "intelligently" and "prudently," that is, in possession of the "substance" rather than the "shadow" of authority. They are *not* required to take the word of the subject of the inquiry.

The fact that employers can be required to make available complete employee records to Fund auditors without a prior showing of reasonable cause does not leave them unprotected and remediless. The Central States Trust Agreements require that Trustee requests for information and

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[30] Central States' audits always commence with an "audit engagement letter" and are conducted in accordance with procedures set forth in a written audit manual. This manual has recently been enlarged and revised by a staff of In-House Certified Public Accountants who comprise the "Field Audit Group."

records be reasonable and specifically related to the necessary and proper administration of the funds. Names and addresses of participants and beneficiaries are *expressly* confidential (Article III, Section 5). Article III, Section 14(a) empowers the Trustees to enter into agreements necessary for carrying out the terms of the Trust Agreement. Article IV, Section 14(e) empowers the Trustees to do whatever acts are necessary to protect trust property whether or not expressly authorized in the trust instrument. The Trust Agreements clearly encompass the development and implementation of fund policy. The *Theut Products* protective order (App. I P.C.) reflects Fund policy on audit confidentiality. This policy is noted in the Funds' audit manual. The Trust Agreements are normally incorporated by reference into two instruments executed by the employer and the union: the collective bargaining agreement and the participation agreement. (Transport executed *three* such incorporating agreements, *supra*, pp. 6-7.) If the Trustees' audit is perceived as being "unreasonable" or unrelated to proper trust administration, or if confidentiality is intentionally breached, there is no authority to suggest that the employer would be precluded from filing suit in order to obtain, as appropriate, either an injunction or damages.

I.A.3. Post-ERISA case law illustrates why audits limited to the records only of concededly covered employees would endanger fund assets and hence be imprudent

On April 18, 1984, this Court unanimously affirmed the Eighth Circuit's *en banc* opinion in *Schneider Moving & Storage Co.* v. *Robbins, et. al., supra*, finding that the Trustees of the Central States Funds were not required to exhaust the arbitration mechanisms of the collective bargaining agreements at bar prior to seeking judicial enforcement of those provisions of the Trust Agreements authorizing audits and collections. Prosser had refused to permit an audit and requested arbitration concerning the Trustees' right to audit as well as a determination of the scope of the audit. Schneider had permitted an audit but requested an arbitration of whether certain employees were "covered" by the collective bargaining agreement and entitled to contributions. Justice Powell, writing for the Court, observed:

> These are multiemployer trust funds. Each of the participating unions and employers has an interest in the

> prompt collection of the proper contributions from each employer. *Any diminution of the fund caused by the arbitration* requirements of a particular employer's collective-bargaining agreement would *have an adverse effect on the other participants.* The enforcement mechanisms established in the trust agreements protect the *collective interests of the parties from the delinquence of individual employers* by allowing the trustees to seek prompt judicial enforcement of the contribution requirements. It is *unreasonable to infer* that these parties would agree to subordinate those mechanisms to whatever arbitration procedures might be required by a particular employer's collective-bargaining agreement. (Slip op. at 9, footnotes omitted, emphasis added)

It is even more unreasonable to *infer*, as did the Sixth Circuit, that these parties, not to mention the Trustees, would be willing to subordinate the determination and collection of contributions receivable to a particular employer's notions of the permissible scope of an audit or to that employer's concession regarding the contractual coverage of its employees and their actual or potential eligibility for fund benefits. In point of fact, unless pertinent records relating to a complete employee population are made available, *coverage disputes*, such as that involved in *Schneider* (and the conflicting Seventh Circuit case *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Howard Martin*, 625 F.2d 171 (1980), are not likely to occur. Like Transport, the employer would simply withhold the records of those employees *it unilaterally determined were not covered*, thereby precluding the Trustees from discovering inaccuracies or omissions except by chance. The following reported decisions are representative examples of how employee benefit funds could easily be deprived of assets if the Sixth Circuit's "limited audit" theory were to prevail.

In *Jim McNeff* v. *Todd*, _____ U.S. _____, 103 S. Ct. 1753 (1983), an employer in the construction industry consistently refused to permit an audit and to remit contributions under a "prehire contract," claiming that its employees were not "covered" by a valid and enforceable collective bargaining agreement. An examination of records ultimately took place through the vehicle of pre-trial dis-

covery, and the funds collected some $5,000.00 upon this Court's finding that prehire contracts are enforceable without proof of union majority status unless and until they are overtly repudiated.[31] Had the *McNeff* audit been entirely consensual, and had the trustees been limited solely to the records of employees who the employer conceded were covered, the audit could not have taken place since the employer asserted that none of its employees were covered.

In *Laborers Health and Welfare Trust Fund, et al.* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983), a coverage dispute in a trustee collection action arose subsequent to a fund audit. The audit revealed and the trustees claimed $131,887.68 in unpaid pension contributions on behalf of a class of employees performing "callback work." The employer contended that "callback work" was not within the union's jurisdiction and that the employees performing it were not covered by the collective bargaining agreement. But for the audit, the trust fund in question would not have discovered that "the Company used nonunion labor for 'call-back work' and that no pension contributions were made for such labor." *See also Brick Masons Pension Trust* v. *F.K. Pullen*, 113 L.R.R.M. 3040 (C.D. Cal. 1983), in which a fund was awarded more than $44,000.00 in unpaid contributions revealed by an audit spanning a mere eight-month period.

In *Bugher* v. *Consolidated X-Ray Services Corp.*, 705 F.2d 1426 (5th Cir. 1983), a coverage dispute arose as the result of *two* audits, one conducted by the Central Pension Fund and one by the employer. The fund audit revealed alleged delinquencies of $104,312.33. The employer's rebuttal audit yielded a conceded delinquency of $143.00. The parties agreed that this gross discrepancy was due to the fact that the employer did not contribute for nonunion employees or for union employees performing cross-country pipeline jobs on the grounds that neither group was covered by the collective bargaining agreement. The district court held for the trustees and awarded the fund $101,039.93 plus

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[31] *See also Welfare Fund* v. *Overhead Door Co.*, 104 L.R.R.M. 2653 (D.D.C. 1980), reversed, 110 L.R.R.M. 2752 (D.C. Cir. 1982). Extremely concerned with delinquent contributions to employee benefit funds nationwide, Congress expressly repudiated the decision in the debates preceding passage of the Multiemployer Pension Plan Amendments Act of 1980, 126 Cong. Rec. (House) 23039 (Aug. 25, 1980).

audit expenses, attorney fees and interest. The court of appeals affirmed. Under the *Central Transport* ruling, the Funds would have been limited to the ludicrous amount of $143.00 for "concededly covered employees."

In *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981), a payroll audit revealed that an employer had paid $40,000.00 in cash directly to nonunion members who performed bargaining unit work on the mistaken assumption that they were not covered. The trusts, to which the money should have been paid, recovered. The court stated: "The payment of cash to nonunion members, however well-intentioned such payment might have been, does not excuse the obligation to make contributions to the funds . . . the funds are established for the benefit of all employees covered by their language and depleted by the amount which the Rolfsons have refused to contribute."

In *Waggoner* v. *Dallaire*, 649 F.2d 1362 (9th Cir. 1981), a trustee audit revealed delinquencies arising out of an oral modification of a collective bargaining agreement in violation of Section 302(c)(5) of the LMRA. The court enforced the contract as written and also tolled the applicable statute of limitations, noting that the union and the funds were separate entities so that the union's participation in the modification did *not* put the trustees on constructive notice of the employer's failure to contribute. *In accord, Kemmis* v. *McGoldrick*, 706 F.2d 993 (9th Cir. 1983, discussed in Central States' Supplemental Brief).[32]

Finally, access to complete employee records is necessary in all situations involving subcontracting clauses where contributions are claimed *measured by hours worked* by nonunion signatories, *Walsh* v. *Schlecht*, 429 U.S. 401 (1977); *Brogan* v. *Swanson Painting Co.*, 682 F.2d 807 (9th Cir. 1982), or where an issue arises as to whether an individual performing covered work is an "employee" under the NLRA or an independent contractor. *See Teamsters Construction Workers Local 13 Health and Wel-*

[32] See also *Manning* v. *Wiscombe*, 498 F.2d 1311 (10th Cir. 1974), a pre-ERISA case in which the court held that certain funds were entitled to contributions on behalf of nonunion members although the contract had been applied for years on a "members only" basis. Trustee access to complete employee records is particularly important in "right to work" states where bargaining unit employees may enjoy the full benefits of a collective bargaining agreement without joining a union or even paying an agency fee.

fare Trust Fund v. *Hawg N Action*, 651 F.2d 1384 (10th Cir. 1981). These situations are likely to occur particularly in the construction and trucking industries.

In *Nichols* v. *Trustees of Asbestos Workers Local 24 Pension Plan*, 3 EBC 1726 (No. 80-563, D.D.C. 1982), the IRS approved a pension plan amendment that retroactively reduced monthly retirement benefits by one-third. The trustees had presented data indicating that, given the state of the plan's assets as well as its current and future liabilities, the previous level of benefits could not be sustained if the plan were to continue to be funded on an actuarially sound basis as required by ERISA. In the course of a lawsuit subsequently filed by adversely affected retirees, it was established that the Local 24 plan had reciprocal agreements with nine other pension plans. These agreements provided that participants working in covered employment within the jurisdiction of another plan would have their contributions transferred to the plan in which they were participants, in this case, the Local 24 plan. The trustees admitted that they had "little way of knowing when participants are working in other jurisdictions," and that they relied on the participants themselves and on employers to make the appropriate reciprocal contributions. The retirees claimed that the trustees had "breached their fiduciary duty by failing to design and implement an adequate system for identifying and collecting employer contributions" due from plans having reciprocal agreements.

While the court refused to find a breach because the reciprocal plan was relatively new, it stated unequivocally "that it is clearly the duty of the Trustees to determine what is owed to the plan" and "to create a system by which future reciprocal contributions may be monitored, recorded, and credited with accuracy. Anything less would not be what 'a prudent man acting in like capacity and familiar with such matters' would do. ERISA Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). How the Trustees fulfill this duty is left to the discretion of the Trustees themselves; the Court, in its limited role in the administration of pension trusts, may only order them to do so."[33]

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[33] *See Waggoner* v. *C & D Pipeline Co.*, 601 F.2d 456, 459 (9th Cir. 1979). Noting "the need for a mechanism to police [compliance with the collective bargaining] agreement" the court stated: "A requirement that contributions be based on all hours worked or paid permits the trustees

(Footnote 33 continued on Page 36)

The Central States Health and Welfare and Pension Funds are not new; they were established, respectively, in 1950 and 1955. As the funds grew in size, it became increasingly necessary to develop systematic methods for enforcing compliance and verifying accuracy. A formal field audit program was therefore instituted based on procedures utilized in the accounting profession and set forth in an audit manual. These procedures have now been refined and set forth in a new and enlarged audit manual. These procedures are themselves expected to develop in accordance with plan experience. In imposing its "limited audit" theory, the Sixth Circuit interfered with "trustee discretion," emasculated the Central States field audit program, and transgressed the "limited role" of courts in the administration of employee benefit trusts. In so doing, the court not only failed to consider the dangers of misreporting in general but, ignored the apparent misreporting of *Central Transport* itself. Refusing to acknowledge the need for the random general audits devised by Central States to effectively monitor *their particular* self-reporting system, the court simply did not give credence to the fact that situations illustrated by the cases set forth above can and do occur although a number of such scenarios were presented to the panel. Substituting its "wisdom" for the "discretion" and experience of the Trustees, without evidence either of the cost of the audit program relative to monies collected, and without an authoritative basis upon which to predicate alternative surveillance schemes, the Sixth Circuit simply dismissed the requested audit as "arbitrary and capricious," imprudent, and a waste of Fund assets. The court's position is belied not only by the facts of *this* case and the cases discussed above; it stands in direct conflict with the approach to Trustee discretion in areas encompassed by ERISA's fiduciary duty provision as articulated in *Nichols* and the circuit decisions cited therein.[34] The Sixth Circuit's "limited audit" theory is clearly erroneous as a matter of practice and precedent.

(Footnote 33 continued from Page 35)
to rely on payroll records to determine if the employers are making the proper contributions to the trust funds." The court did not qualify or otherwise limit the phrase "payroll records."

[34] *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981); *Nedd* v. *United Mine Workers*, 556 F.2d 190 (3d Cir. 1977), on remand, 506 F. Supp. 891 (M.D. Pa. 1981); *Johnson* v. *Botica*, 537 F.2d 930 (7th Cir. 1976); *Pete* v. *United Mine Workers*, 517 F.2d 1275 (D.C. Cir. 1975).

I.B. Prudence dictates that fund trustees develop independent methods for monitoring employer compliance: reliance on third persons is inconsistent with the spirit of ERISA, the LMRA and case law

One of the most erroneous and harmful aspects of the Sixth Circuit's decision is the court's assumption that the Funds can be adequately protected by the efforts of unions, employees themselves, or the Secretary of Labor. The notion that third persons can and should be relied upon as effective and consistent safeguards to monitor a self-reporting system of collecting revenues and to identify undisclosed plan participants stands in utter opposition to Congress's intent that employee benefit funds should be entirely independent of union control (29 U.S.C. § 186(c)(5), LMRA), that "trustee responsibilities" are nondelegable (29 U.S.C. § 1105, ERISA), that collection actions should be streamlined (126 Cong. Rec. (House) 23039, August 25, 1980), and that it is the function of trustees to protect participants and beneficiaries and not that of beneficiaries to protect the trusts (29 U.S.C. § 1001(a), *et. seq.*).[35]

The court of appeals placed particular reliance on union efforts in monitoring the honor system of reporting and protecting the interests of all eligible participants. Such reliance is inconsistent with decisions of this Court and of the Third, Eighth, and Fifth Circuits. (Petition, 13-15).

In *Schneider Moving & Storage Co., et al.* v. *Robbins, et al., supra*, this Court rejected the argument that unions owe an express or implied statutory or contractual duty of fair representation to benefit fund trustees. Recognizing that unions might be unwilling to expend their limited resources to arbitrate coverage disputes on behalf of trustees without a requirement of reimbursement, or that the union might disagree with the trustees' position and either refuse to arbitrate altogether or compromise the trustees' position in arbitration, which would predetermine the ultimate judicial outcome and hence potentially diminish fund assets, the Court found it *unlikely* that the parties to the Central States Trust Agreements intended to *rely* on the union to arbitrate

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[35] *See United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *Schneider Moving and Storage Co. et al* v. *Robbins, et. al.*, 104 S. Ct. 1844 (1984) and Petition for Certiorari, pp. 12-17.

disputes arising under particular employers' collective bargaining agreements in audit and collection matters (slip. op. pp. 9-11). Hence, direct access by the Trustees to federal courts was approved, consistent with the *en banc* opinion of the Eighth Circuit, 700 F.2d 433 (8th Cir. 1983).

The Third Circuit addressed and rejected the "fair representation" argument specifically in the context of surveillance strategies. In *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981), the court stated that fund trustees, not unions, have a fiduciary duty to "oversee" employer contributions: "While the union does owe a duty of fair representation to its members (citations omitted), it does not control, nor is it in a position to oversee, the employer's contributions to the fund" (p. 599, fn. 10).[36]

Even if unions were in a position to "oversee" employer reporting, the duty of fair representation to the bargaining unit as a whole might prompt them not to press claims for fringe benefits if this jeopardized base wages or jobs. As this Court noted in its *Schneider* opinion, *supra:*

> Even if there were a duty of fair representation here, it would accord the union wide discretion and would provide only limited protection to trust beneficiaries. A primary union objective is "to maximize overall compensation of its members." *Barrentine* [v. *Arkansas-Best Freight System*], 450 U.S., at 742. Thus, it may sacrifice particular elements of the compensation package "if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." *Id* (slip. op., pp. 11-12, fn. 22).

Although the Court here addressed the union's duty of fair representation in the context of a purported duty to arbitrate coverage disputes on behalf of benefit fund trustees, the reasoning applies with equal force to a purported duty on the part of a union to monitor a *fund's* self-reporting system. As observed in *Barrentine, supra, collective* bargaining and the duty of fair representation under the LMRA are not necessarily consistent with the protection of *individual* rights, particularly individual *statutory* rights. To the

[36] Like the Trustees, unions may also be *physically* unable to monitor reporting at every employer's facility in their jurisdiction every month.

extent that the Sixth Circuit limited the scope of the Trustees' audit in reliance on the union to protect the benefit rights of all covered employees, the decision was clearly erroneous.

The court also believed that employees could pursue their own benefit rights, suggesting that they might be estopped from claiming them if they did not.

The Third Circuit expressly repudiated such a proposition in *Rosen* v. *Hotel and Restaurant Employees, Local 274, supra*, and forced a fund to grant a participant his benefits even though the employer did not contribute appropriately and even though the district court, in denying the pension claim, had "emphasized that Rosen was indifferent and pressured neither the Trustees, the employer nor the union to secure the contributions" (637 F.2d at 596). *See also Pacific Iron & Metal Co.* v. *Western Conf. of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash. 1982), in which the court stated that an employee decision to decertify the union did not constitute a voluntary waiver of pension rights.

Finally, the court of appeals suggests that the Secretary of Labor can aid the funds. Neither the legislative history of ERISA nor the text of the statute supports the idea that the Secretary's investigative activity comprehends random general audits similar to those performed routinely by the Administrator of the Wage and Hour Division of the Department of Labor under the Fair Labor Standards Act (29 U.S.C. § 211). Thus, ERISA does not authorize the Secretary *to enter* an employer's premises and inspect books and records unless he has reasonable cause to believe a violation of the statute has occurred (29 U.S.C. § 1134).[37] Even with reasonable cause, the Secretary's investigative activity is discretionary. Given the large number of employers contributing to employee benefit plans and the manpower available to the DOL, history and logic suggest that the Secretary's intervention will be reserved for unusual situa-

[37] "Reasonable cause" is required only for *physical entry*, not for DOL requests for the production of records at its offices. Clearly, the more limited in scope a trustee audit is, the less is the ability of a fund to detect discrepancies and hence to provide the DOL with "reasonable cause" to conduct a more substantial on-site investigation. This applies *a fortiori* to anyone else who might request a DOL audit. In any event, the government concedes that routine employer audits would impose a great burden. (*See* United States' Brief in Support of Petition, p. 19.)

tions. In fact, it appears that the major focus of DOL investigative activity has been and will continue to be plans themselves and their trustees. CCH Pension Plan Guide ¶ 25,496 (May 19, 1983). As the Eighth Circuit observed in *Robbins* v. *Prosser*, 700 F.2d at 422:

> Defendants suggest that the trustees, in addition to asking the union to invoke arbitration, could also seek administrative or criminal remedies, but these avenues are even more remote and uncertain than the second-hand access to arbitration that is put forward as the funds' main recourse.

Significantly, in enacting the MEPPAA, Congress *withdrew* from the Secretary his power to institute a collection action (29 U.S.C. §§ 1132(b)(2), 1145). Any implication that the Funds can rely on the DOL to conduct random, routine field audits is clearly erroneous.

I.C. Prudence dictates that the Central States Trustees maintain a vigorous field-audit program as an "internal control" which is relied upon by its independent CPA in certifying the Funds' annual financial reports prepared

ERISA requires employee benefit funds to file detailed annual financial reports in accordance with generally accepted accounting principles which assure that the information contained therein presents a fair and accurate picture, most importantly, of the plan's liabilities and net assets available to pay plan benefits.[38] This report must, in turn, be verified by an independent certified public accountant after himself examining the plan's books, records, other supporting documentation, and internal controls in accordance with generally accepted auditing standards.

In accordance with FASB No. 35, two of the most critical foci of independent investigation are the plan's participant data and contributions received or receivable. In assessing a plan's financial statements, an independent auditor generally looks first to the plan's internal accounting controls, for example, its record-keeping, verification, bill-

[38] *See Audits of Employee Benefit Plans*, American Institute of Certified Public Accountants, 1983; Financial Accounting Standards Board (FASB) Statement No. 35, *Accounting and Reporting by Defined Benefit Pension Plans* (March, 1980). The primary objective of a plan's financial statements is to present information that is useful in assessing the plan's present and future ability to pay benefits when due.

ing, claims processing, and disbursements mechanisms.[39] A field audit program to verify the accuracy of participant data and contributions is regarded as an important "internal control." If the procedures used by the plan's internal auditors comply with generally accepted auditing standards, the independent auditor may feel he can rely on this control for assessing the general accuracy of employer reporting and thus limit his own field testing. Conversely, if audits of contributing employers are not performed by a plan or the independent auditor is not satisfied with the audit results, he may find it necessary to take to the field himself and examine the records of selected employers.[40]

Arthur Young and Co. is the independent auditor of Central States' annual financial reports. The company has filed Amicus Briefs, which set forth the opinion of professionals in the field. It is clear that Arthur Young does not regard an audit of the records of concededly covered employees as an inquiry comporting with generally accepted auditing standards. This is because such an audit deprives the auditors from *independently* verifying the accuracy or completeness of the employer's representations.[41] Hence, limited audits cannot serve as a reliable internal control. Conversely, the existence of a vigorous field audit program, governed by generally accepted auditing procedures that permit access to pertinent records encompassing a complete "employee universe," does serve as a reliable internal control which in turn creates a reasonable belief that, viewing the plan as a whole, participants have been correctly reported and contributions accurately made and that the plan's financial statements present a fair and accurate picture of its ability to pay benefits (providing that the plan's internal mechanisms for processing the data are also satisfactory).

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[39] *See* detailed checklist in Gilbert, Lachowicz, and Zid, *Accounting and Auditing for Employee Benefit Plans* (Warren, Gorham & Lamont: New York and Boston, 1978), Chapter 14.

[40] *See Gilbert*, et al., *Accounting and Auditing for Employee Benefit Plans*, *supra*, Chapter 15, for suggested procedure in testing employer records for accurate reporting.

[41] *See* AICPA, Statement on Auditing Standards No. 39 § 17, AU 350.17. "An Auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.

As noted above, Central States maintains a sizeable audit staff, comprised primarily of CPAs who have been trained to examine employer records in accordance with generally accepted auditing standards. Arthur Young approves of this internal control, clearly believing that it encourages correct reporting, deters evasions, and permits the Trustees to have better knowledge of the Funds' assets and liabilities in the interests of participants and beneficiaries. It would be *imprudent* to fail to defend or to weaken an established practice which has been endorsed by the Plans' independent auditor and contributes to the preservation of Central States' tax-exempt status.[42]

Both pre-ERISA and post-ERISA law is well-established that reviewing courts may not substitute their own judgment for that of benefit fund trustees or interfere with their decisions unless these decisions are "arbitrary and capricious." *Danti* v. *Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Rehmar* v. *Smith*, 555 F.2d 1362 (9th Cir. 1976). For trustees' conduct to qualify as "arbitrary and capricious," however, the act or decision must lack substantial justification, have no basis in fact, be erroneous as a matter of law, be inconsistent, or be made in bad faith.[43]

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[42] If Central Transport prevails, the Trustees will have no alternative but to initiate lawsuits to compel the production of records through discovery. This will place a serious burden on fund assets as well as on the federal courts. There is little litigation on this subject. However, the Seventh Circuit, in an unreported decision, stated that a request for discovery is different from a request to compel a complete audit on the merits. *See Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Hribar Trucking*, No. 81-2422 (June 16, 1982). Should other courts, however, decide that funds may not obtain through discovery what they are not entitled to on the merits, a new privilege for employee records will have been created that is not found in the Federal Rules of Evidence. This Court has expressly rejected the creation of new privileges under Rule 501 of the Federal Rules of Evidence where the effect of such privileges will obstruct lawful and necessary discovery. *See U.S.* v. *Arthur Young*, No. 82-687 (March 21, 1984). (No accountant-client privilege for tax-accrual work papers, even though these papers contain the accountant's *confidential opinions* on *possible* IRS positions with regard to the taxpayer.)

[43] These qualifications are legion in circuit decisions. By way of example, *see Marsh* v. *Greyhound Lines, Inc.*, 488 F.2d 278 (5th Cir. 1974); *Maness* v. *Williams*, 513 F.2d 1264 (8th Cir. 1975); *Adams* v. *N.J. Brewery Employees Pension Trust Fund, et al.*, 670 F.2d 387 (3d Cir. 1982); *Wardle* v. *Central States, Southeast and Southwest Areas Pension*

(Footnote 43 continued on Page 43)

The court of appeals did substitute its judgment for that of the Trustees. Without showing that random general audits were arbitrary and capricious as qualified by a majority of other courts, it created a *particularized* "reasonable cause" standard for the production of documents based on its own narrow view of relevance. For all the reasons set forth above, the court's departure from the traditional method of reviewing discretionary trustee activity and its interpretation of the "prudent man" rule of ERISA are clearly erroneous.

II. THE TRUSTEES' NEED FOR INFORMATION OUTWEIGHS THE EMPLOYER'S INTEREST IN CONFIDENTIALITY: A REVIEW OF THIS DEFENSE TO DISCLOSURE IS AS NECESSARY IN THE CONTEXT OF ERISA AS IT WAS IN THE CONTEXT OF THE NATIONAL LABOR RELATIONS ACT

The thesis of Petitioners' argument, in a nutshell, is that audits must be independent if they are to serve as a reliable tool for verifying representations made by the subject of the inquiry. Governmental agencies, in particular the IRS, have been granted—both by the legislature and the judiciary—great investigative latitude commensurate with the public interests at stake.[44] Fund trustees serve an analogous public interest, namely, "the continued well being and security of millions of employees and their dependents" (29 U.S.C. § 1001). They, too, require investigative latitude. However,

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(Footnote 43 continued from Page 42)

Fund, 627 F.2d 820 (7th Cir. 1980). Although these decisions have emerged mainly in the area of benefit claims, where courts have scrutinized trustees' interpretations of plan documents, there is no authority to suggest that acts or decisions undertaken by trustees pursuant to the "prudent man" rule of ERISA should be more stringently reviewed *as long as* the trustees are acting *solely* in the interests of participants and beneficiaries. *See Struble, et al.* v. *New Jersey Brewery Employees' Welfare Trust, et al.*, No. 83-5115, et al. (3d Cir. April 16, 1984); *see also Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 EBC 1726 (D.D.C. 1982). This approach would be consistent with the common law basis of the rule.

[44] Confidentiality arguments carried little weight in *U.S.* v. *Arthur Young, supra*, in which the Court rejected an accountant-client privilege. *See also Donaldson* v. *U.S.*, 400 U.S. 517 (1971), in which the Court stated that a taxpayer had *no proprietary interest in his employment and compensation records* such that he could prevent their production to the IRS pursuant to a summons issued to his former employer under 26 U.S.C. § 7602.

because they are private individuals, ultimately gathering information for private funds, confidentiality concerns arise which are not present in agency-initiated audits. Hence, competing needs must be accommodated.

While a balancing of competing interests has led to the emergence of well-defined rules for the disclosure of confidential information to unions in order to enable them to effectively perform their role as bargaining representatives, this technique has not yet led to equivalent disclosure standards where benefit fund trustees request information under the authority of ERISA in order to effectively perform their role as prudent fiduciaries. Nevertheless, the district court accepted, as an appropriate analogy, the relevance standards enunciated by this Court and the courts of various circuits in 8(a)(5) refusal to bargain cases, and found that on balance the Trustees' interest in verifying information on employment status through random general audits outweighed the employer's interest in protecting the confidentiality of records, given the safeguards offered by the Central States Funds to protect that interest.

The court of appeals accepted the NLRB disclosure rules analogy only with reluctance, and then found that Petitioners did not satisfy the relevance test or protect the interests of Transport or its noncovered employees. Misconstruing the purpose of the audit as a strategy "triggered" by reporting inaccuracies, the court found that "concern over the status of four employees" did not "justify an investigation into the records of all Transport's employees". As observed above, the court inexplicably failed to recognize that these findings were the *result* of the audit not its precipitating cause. Moreover, it did not even *once* address the safeguards *offered* to protect the interests of Transport and its employees, let alone decide whether such safeguards were sufficient and should be considered as part of a balancing test.

The key to disclosure in NLRB decisions is relevance. *See Curtiss-Wright* v. *NLRB*, 59 L.R.R.M. 2433 (3d Cir. 1965). Webster's and Oxford define "pertinent" as "relevant" to the matter at hand. The Trustees have shown why access to "pertinent" records beyond those of "concededly covered employees" is "relevant" to a "prudent" inquiry. The Sixth Circuit's *particularized* "reasonable cause" stan-

dard for random Trustee audits is utterly inconsistent with the liberal "discovery-type" standard of relevance and hence disclosure approved by this Court in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967). It is also inconsistent with the balancing process undertaken by the Court in *NLRB* v. *Detroit Edison*, 440 U.S. 301 (1979), discussed in the Petition at pp. 24-25.

Detroit Edison suggests that the greater the sensitivity of the information requested, the greater is the interest in confidentiality. Nevertheless, the Court did not give its approval to a naked assertion of confidentiality. If information is relevant, it must be produced in some useful form. Moreover, consent to the release of allegedly confidential information, even of a highly sensitive nature, is not a *per se* requirement for its disclosure. Rather, consent would appear to depend on the burden of obtaining it and on whether an express promise not to disclose was made.

In the case at bar, the court of appeals accepted Transport's assertion of confidentiality with regard to an alleged majority of its employees, although no alternatives were offered to permit independent verification of the accuracy of reporting, although the burden on the trustees of obtaining consent from these employees would have been onerous, if not impossible, although the materials requested were not of the same degree of sensitivity as aptitude tests and test scores, and although more than a quarter of a million dollars of alleged delinquencies were determined for the concededly covered group before the auditors were asked to leave the premises.

The Trustees have offered specific and substantial safeguards to protect confidentiality. See Petition at pp. 25-26 and App. I P.C. These safeguards can be monitored by the employer. Moreover, if this information is "leaked" to promote union-organizing efforts or the competitive interests of rival employers (specters which Transport raised without a shred of evidence to show that the Trustees have *ever* transmitted audit results for such purposes), this would be not only a breach of the strict neutrality rule set forth by this Court in *NLRB* v. *Amax Coal Co.*, *supra*, it would also be a breach of the Trust Agreements and Fund policy and hence remediable in a judicial proceeding. More to the point: fund trustees have a *practical stake* in promoting

confidentiality so as to assure the continued cooperation of employers in monitoring a self-reporting system from which employers themselves stand to benefit. *See U.S.* v. *Bisceglia*, *supra*.

Before now, this Court has enhanced the union's ability to perform its statutory duty by fashioning standards of relevance and articulating disclosure rules in the context of collective bargaining; it has done so by balancing competing interests. Petitioners now request this Court to undo the *de facto* privilege created by the court of appeals, and enhance the ability of fund trustees to perform their fiduciary obligations through a similar process of balancing.

III. THE TRUST AGREEMENTS GOVERNING THE CENTRAL STATES FUNDS PROVIDE A CONTRACTUAL BASIS FOR RANDOM GENERAL AUDITS

In conducting random general audits, Petitioners have consistently relied on Article III, Section 5, *sentence two* of the Trust Agreements. This provision states:

> The Trustees may, by their representatives, examine the *pertinent records* of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust (App. F P.C., A 46, emphasis added).

Exercising their power to construe the terms of the Trust Agreements, and to make these constructions binding on employers, employees, and the union (Article IV, Section 17, App. F P.C., A 48), the Trustees have consistently and at all stages of this litigation urged that the term "pertinent records" means records necessary to complete the audit in accordance with recognized procedures which require independent verification of employer representations. At a minimum, this construction could *reasonably* include records beyond those of employees the *employer* concedes are covered. Indeed, in its *Schneider* opinion, *supra*, this Court noted, quoting Article III, Section 5, *sentence two*, of the Trust Agreements: "To ensure compliance with the contribution requirements, the trust agreements gave the trustees the authority to examine petitioners' payroll records" (slip. op., p. 5). The Court did not *qualify* the phrase "payroll records."

The district court upheld the Trustees' construction; the court of appeals reversed, finding that the term "pertinent records" was synonymous with the term "employee records."[45] In reaching this conclusion, the court first of all substituted the term "employee records" for the term "pertinent records," in effect *rewriting an express* provision of the Trust Agreements. It also rejected the Trustees' reasonable construction of the term "employee," which encompasses not only the "concededly covered" group but also the "*de facto* covered" group which the court itself agreed could sustain a claim for benefits, *regardless of concession*, in a court or through arbitration (App. B P.C., A 29).[46]

As Central States argued in the Petition for Rehearing *en banc* (pp. 7-9), the Trustees *have never asserted* that the term "employee" as used in the Trust Agreements means "covered and noncovered employee" (*id.*, A-24/25). They cannot, by law, extend "coverage" under the labor agreement, "rights" under the Trust Agreements, or "benefits" in the Funds to "noncovered employees." What the Trustees *do claim* is that they have a nondelegable duty under 29 U.S.C. §§ 1104 and 1105 to look beyond lists and records of "*concededly* covered employees" in order to verify that an employer is accounting for *all covered employees* in its work force (conceded and *de facto*), particularly since it is the Funds which bear ultimate financial liability to any employee who can sustain a claim for benefits on the basis of covered employment actually performed *regardless* of whether contributions were ever or can ever be received on

[45] Article I, Section 3(a) of the Trust Agreements defines the term "employee" as one covered by the collective bargaining agreement and eligible for contributions under the contract or applicable law (App. F P.C., A 43). Article III, Section 5, sentence two *expressly does not* limit the production of records for audit purposes to those of "employees," no less to those of "concededly covered employees:" it specifies "pertinent records."

[46] Focusing on the definition of "employee" in Article I, Section 3(a), the court reasoned that if the term "employee" is construed to include "noncovered" as well as "covered" employees, then the Trustees would not only be entitled to examine the records of "noncovered" employees but would also have to extend rights and benefits under the trusts to "noncovered" employees which would be contrary to the intent of the parties to the Trust Agreements as well as to the collective bargaining agreements. It would also be contrary to ERISA, which requires fund trustees to exercise their fiduciary obligations solely to participants and beneficiaries (*id.*, A-19; 24-25).

his behalf. In this regard, Petitioners point out the obvious: while nonparticipants and nonbeneficiaries *are* admittedly outside the scope of the Trustees' fiduciary duty, undetected "covered" employees are not nonparticipants. Properly construed, the Trust Agreements are clearly *consistent* with ERISA. *See* 29 U.S.C. § 1104(a)(1)(D). 29 U.S.C. § 1002(7) defines "participant" as an "employee" who is or "may become" eligible for benefits.

In rejecting the Trustees' contractual claim, the panel departed from the limited standard of judicial review set forth above in connection with ERISA. The decision is therefore in direct conflict with *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), in which the court asserted that where a trust agreement affords trustees broad powers of construction, "the judicial role is limited to determining whether the trustees' interpretation was made rationally and in good faith, not whether it was right." This Court, in its *Schneider* opinion, *supra*, also accorded great weight to the Trust Agreements, noting that any good faith interpretation thereof by the Trustees would be binding. The Trustees' construction of "pertinent records" in the case at bar comports with good faith and audits conducted in accordance with generally accepted standards are surely within the scope of their authority. The court of appeals' interpretation of the Trust Agreements as well as its standard of review of the Trustees' construction is clearly erroneous.

CONCLUSION

The court of appeals' decision has placed the trustees of multiemployer employee benefit funds in an untenable position: they must shoulder their fiduciary responsibilities independently but are urged to rely on the discretionary activity of Unions and the Secretary of Labor who may be moved by competing interests of their own and over whom the trustees have no control; they must exercise these fiduciary obligations solely on behalf of participants and beneficiaries but are urged to rely on the very people whose interests they are supposed to protect; they must

disclose information to plan participants whose identity they cannot necessarily ascertain; they must protect the actuarial solvency of the funds but cannot fully oversee employer contributions; they must grant credits and benefits to employees on the basis of covered employment but cannot fully verify coverage in advance of claims made; they must conserve fund assets but are faced with the possibility of conducting multiple law suits in order to pursue a routine matter of trust administration.

For all of the reasons set forth herein, Petitioners respectfully request this Court to reverse the decision of the Sixth Circuit; to affirm the decision of the district court; to give content to the prudent man and fiduciary duty rules of ERISA; to articulate a uniform standard for the judicial review of trustee actions; to establish an appropriate standard of relevance and hence appropriate disclosure rules for the production of documents to trustees; and to reconfirm the principles of nondelegability and trustee independence.

Respectfully submitted,

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August 9, 1984

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1983

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

PETITIONERS' APPENDIX

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APPENDIX A

Petitioners' Complaint

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Plaintiffs,

vs. Case No.

CENTRAL TRANSPORT, INC., a Michigan corporation; CENTRAL CARTAGE CO., a Michigan corporation; GENESEE CARTAGE CO., a Michigan corporation; QUAD STATE LEASING, INC., a Michigan corporation; CADILLAC LEASING, INC., a Michigan corporation; DUNES LEASING, a Michigan corporation; CENTRAL RECAPPING, INC., a Michigan corporation; MICHIANA TRUCKING, INC., a Michigan corporation; COMPANY 17, DANVILLE ILLINOIS LEASING, MICHIGAN EXPRESS, MOHAWK CARTAGE, MOHAWK MOTOR, INC., FLINT CARTAGE, BANCROFT FREIGHT LINES, and MCKINLEY TRANSPORT, LIMITED,

Defendants.

COMPLAINT

NOW COME the Plaintiffs, by their attorneys, Russell N. Luplow and Charles J. Taunt, Of Counsel, and as and for a cause of action against the Defendants allege and show to the Court as follows:

1. Jurisdiction of this Court is founded upon: Section 301(a) of the Labor Management Relations Act of 1947, as

amended, (29 USC Section 185(a)); and Section 502 of the Employee Retirement Income Security Act of 1974, (29 USC 1132) in that the Plaintiffs are aggrieved by the Defendants' violation of a collective bargaining agreement, Trust Plan and Trust Agreement and the Defendants' continued refusal to comply with certain terms of a collective bargaining agreement and the Trust Plan and Trust Agreement of the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund thereby violating the provisions of the Employee Retirement Income Security Act of 1974 and the terms and provisions of said employee benefit plans, Section 301 of the Labor Management Relations Act of 1947 and the Common Law of the State of Michigan.

2. Plaintiff, Central States, Southeast and Southwest Areas Pension Fund is an employee benefit plan, within the meaning of Sections 3(1)(2)(3)(21), 405(C)(1)(B) and 502 of the Employee Retirement Income Security Act of 1974 (29 USC 1002(1)(2)(3)(21), 1109(C)(1)(B) and 1132) and brings this action on behalf of the Trustees, participants and beneficiaries of said Plan. The Central States, Southeast and Southwest Areas Pension Fund maintains offices and its principal place of business in a state other than the State of Michigan, to-wit: 8550 West Bryn Mawr Avenue, in the City of Chicago, County of Cook, State of Illinois and is a citizen of the State of Illinois.

3. Plaintiff, Central States, Southeast and Southwest Areas Health and Welfare Fund is an employee benefit plan, within the meaning of Sections 3(1)(2)(3)(21), 405(C)(1)(B) and 502 of the Employee Retirement Income Security Act of 1974 (29 USC 1002(1)(2)(3)(21), 1109(C)(1)(B) and 1132) and brings this action on behalf of the Trustees, participants and beneficiaries of said plan. The Central States, Southeast and Southwest Areas Health and Welfare Fund maintains offices and its principal place of business in a state other than the State of Michigan, to-wit: 8550 West Bryn Mawr Avenue, in the City of Chicago, County of Cook, State of Illinois and is a citizen of the State of Illinois.

4. Defendants, Central Transport, Inc., Central Cartage Co., Genesee Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping, Inc., and Michiana Trucking, Inc. are corporations organized and existing under the laws of the state of Michigan.

5. Defendants, Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage and Bancroft Freight Lines are, upon information and belief, corporate entities organized and existing pursuant to the laws of a state which is unknown to Plaintiffs.

6. Defendant McKinley Transport, Limited is a corporation organized and existing under the laws of the province of Ontario, Canada and is duly authorized to transact business within the state of Michigan.

7. Defendants, Central Transport, Inc., Genesee Cartage Co., Quad State Leasing, Cadillac Leasing, Inc., and Dunes Leasing maintain offices and a place of business within the State of Michigan, to-wit: 34200 Mound Road, Sterling Heights, Michigan 48077 and are citizens of the State of Michigan.

8. Defendant, Central Recapping, Inc., maintains offices and a place of business within the State of Michigan, to-wit: 6419 East Ten Mile Road, Warren, Michigan and is a citizen of the State of Michigan.

9. Defendant, Central Cartage Co., maintains offices and a place of business within the State of Michigan, to-wit: 3399 East McNichols, Detroit, Michigan and is a citizen of the State of Michigan.

10. Defendant, Michiana Trucking, maintains offices and a place of business within the State of Michigan, to-wit: 4570 Sterns, Lambertville, Michigan 48044 and is a citizen of the state of Michigan.

11. Defendants, Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage and Bancroft Freight Lines, maintain offices and a place of business within the state of Michigan, to-wit: 34200 Mound Road, Sterling Heights, Michigan 48077 and are citizens of a state which is unknown to Plaintiffs.

12. Defendant, McKinley Transport, Limited, maintains offices and a place of business within the state of Michigan, to-wit: 34200 Mound Road, Sterling Heights, Michigan 48077 and is a citizen of the Province of Ontario, Canada. McKinley Transport Limited engages in business within the state of Michigan.

13. Defendants are engaged in the business of the transportation of goods in interstate commerce as common carriers.

14. Defendants are employers and parties in interest in an industry affecting commerce within the meaning of Section 3(5)(11)(12) and (14) of the Employee Retirement Income Security Act of 1974 (29 USC 1002(5)(11)(12) and (14)) and Labor Management Relations Act of 1947 (29 USC 151 *et seq.*).

15. For all times relevant herein, Defendants were parties to and agreed to abide by the terms of collective bargaining agreements between themselves and various Local Teamster Unions who are labor organizations that represent for purposes of collective bargaining, certain employees of Defendants and employees of other employers in industries affecting interstate commerce within the meaning of Sections 2(5), 9(a), and 301(a) of the Labor-Management Relations Act of 1947, as amended (29 USC 151, *et seq.*).

16. The executed collective bargaining agreements described herein contain provisions whereby Defendants agreed to make timely payments to Plaintiffs' trust funds for each employee covered by said agreement. By execution of said collective bargaining agreements, the Defendants authorized the employers associations which are parties thereto to enter into appropriate trust agreements necessary for the administration of Plaintiff Funds and to designate the employer trustees under such agreement, thereby waiving all notice and ratifying all actions taken or to be taken by the trustees within the scope of their authority.

17. Defendants have executed Participation Agreements (applicable to the Pension Fund) and Joint Applications

(applicable to the Health and Welfare Fund) wherein they agreed to be bound by and assented to all of the terms of the Trust Agreement creating the respective Funds and all of the rules and regulations theretofore and thereafter adopted by the Trustees of said trust funds pursuant to said trust agreements and all action of the trustees in administering such trust funds in accordance with the trust agreements and rules adopted.

18. By executing said Participation Agreements and Joint Applications Defendants agreed to make timely payments to Plaintiffs' trust funds and to designate as their representatives such trustees as are named in the trust agreement together with their successors.

19. Defendants have failed to perform their obligations pursuant to the terms and conditions of the collective bargaining agreements, participation agreements, joint applications and trust agreements for the Pension and Health and Welfare Funds including but not limited to the following:

a. Failure to make continuing and prompt payments to the Plaintiff Pension and Health and Welfare Funds as required by the applicable collective bargaining agreements, participation agreements, joint applications and trust agreements between the parties;

b. Failure to furnish to the Plaintiffs' trustees, upon reasonable demand, the names, current addresses, social security numbers and hours worked by each employee.

c. Failure to accurately report employee work status to Plaintiffs.

d. Failure to permit Plaintiffs' representatives to complete an examination of the pertinent records of each Defendant at said Defendant's place of business, despite Plaintiffs' request to do so.

20. Plaintiffs' trust agreements provide at Article III, Section 5:

> Production of Records. Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and such other information as the Trustees

may reasonably require in connection with the administration of the Trust. The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust . . .

21. Plaintiffs are informed and believe that for a substantial period of time, the exact dates being unknown to Plaintiffs, Defendants have employed numerous persons pursuant to the within-referenced collective bargaining agreements for whom Defendants have failed to accurately report the true employment status to Plaintiffs and on whose behalf Defendants have failed to remit the required contributions to Plaintiffs.

22. On February 4, 1980, Plaintiffs, by their duly authorized representatives, commenced an audit of the pertinent records of Defendants.

23. Plaintiffs continued to conduct an audit of Defendants' records until March 28, 1980.

24. On March 28, 1980 Defendants directed Plaintiffs' representatives to cease their audit as of the close of business on that date and vacate Defendant's premises. From and after said date Defendants have refused to permit Plaintiffs' representatives to continue an audit and review the pertinent records of Defendants.

25. Defendants' actions in refusing to permit Plaintiffs' representatives to continue an audit and review Defendants' pertinent records constitute a violation of the applicable provisions of the within-referenced collective bargaining agreements, participation agreements, joint applications, trust agreements, and the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001, *et seq.*)

26. Upon information and belief, Defendants are indebted to Plaintiffs for certain monies, the exact amounts of which are unknown to Plaintiffs at this time.

27. Plaintiffs are unable to determine the exact amount of contributions which may be owing from Defendants to Plaintiffs unless Defendants are compelled by this Court to furnish Plaintiffs with the names, addresses, social security

numbers and hours worked by each employee and permit Plaintiffs' representatives to examine the pertinent records of Defendants and conduct an audit to determine and verify which individuals have been employed by Defendants pursuant to the within-referenced collective bargaining agreements and accurately determine their work status.

28. Plaintiffs have no adequate remedy at law for Defendants' refusal to comply with the terms, conditions, rules and regulations governing Plaintiffs' Trust Funds, and unless the Defendants are enjoined from breaching and continuing to breach the terms of the collective bargaining agreements, participation agreements, joint applications, Trust Plans and Trust Agreements and mandatorily compelled to coply with said documents, Plaintiffs and their Trustees will suffer irreparable harm.

29. The applicable collective bargaining agreements between Defendants and the various local teamster unions include provisions that employers who are delinquent in Pension and Health and Welfare contributions to Plaintiffs must also pay all attorneys' fees and costs of collection of those delinquent contributions.

30. Plaintiffs' Pension Trust Agreement provides, *inter alia*, pursuant to Article XIV, Section 4, and Plaintiffs' Health and Welfare Trust Agreement provides, *inter alia*, pursuant to Article XI, Section 4, that:

> Non-payment by an Employer of any moneys due shall not relieve any other Employer from his obligation to make payment. In addition to any other remedies to which the parties may be entitled, an Employer shall be obligated to pay interest at the rate of nine (9%) percent per annum on the moneys due to the Trustees from the date when the payment was due to the date when the payment is made, together with all expenses of collection incurred by the Trustees, including, but not limited to, attorneys fees and such fees for late payment as the Trustees determine as permitted by law.

31. Section 502(g) of the Employee Retirement Income Security Act of 1974 (29 USC 1132(g)) provides that:

> In any action under this title by a participant, beneficiary, or fiduciary, the Court, in its discretion may

allow a reasonable attorneys fee and costs of action to either party.

32. Pursuant to the above-cited contractual and statutory provisions, Defendants are indebted to Plaintiffs, in addition to such sums as may be found to be due and owing from Defendants to Plaintiffs for delinquent contributions and interest thereon, such additional costs as may be incurred by Plaintiffs for actual attorney fees and expenses of collection incurred by them for recovery of the delinquent contributions described herein.

WHEREFORE, Plaintiffs demand the following relief:

1. An order to show cause why Defendants should not be enjoined from violating the terms of the collective bargaining agreements, participation agreements, joint applications, Trust Plans and Trust Agreements.

2. A Preliminary Injunction enjoining Defendants from violating the terms of the collective bargaining agreements, Participation Agreements, Joint Applications, Trust Plans and Trust Agreements and further directing Defendants to permit Plaintiffs' representatives to conduct an audit and examine the pertinent records of each Defendant at the Defendant's place of business and to provide representatives of Plaintiffs with the names, current addresses, and social security numbers of its employees and the hours worked by each employee together with such documentation as may be required by Plaintiffs' representatives to verify said information.

3. A permanent injunction upon hearing of this cause, enjoining the Defendants from violating the terms of the collective bargaining agreements, participation agreements, joint applications, Trust Plans and Trust Agreements and from disposing of any assets until the terms of the collective bargaining agreements, and Trust Agreements are complied with.

4. A judgment on behalf of Plaintiff, Central States, Southeast and Southwest Areas Pension Fund for such amounts as may be determined to be due and owing from Defendants to Plaintiffs together with accumulated interest thereon from the respective due dates of such contributions,

costs incurred by Plaintiffs in collecting such contributions, actual attorneys' fees and costs of this action, and for such amounts as become due during the pendency of this proceeding.

5. A judgment on behalf of Plaintiff, Central States, Southeast and Southwest Areas Health and Welfare Fund for such amounts as may be determined to be due and owing from Defendants to Plaintiff together with accumulated interest thereon from the respective due dates of such contributions, costs incurred by Plaintiff in collecting such contributions, actual attorneys' fees and costs of this action, and for such amounts as become due during the pendency of this proceeding.

6. That the court retain jurisdiction of this cause pending compliance with its orders.

7. For such other, further or different relief as the Court may deem just and proper.

(s) Russell N. Luplow
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Of Counsel:
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APPENDIX B
Central States' Audit Engagement Letter

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND PENSION FUNDS

November 5, 1979 CERTIFIED MAIL

Mr. Robert Sigler
Centra, Incorporated
34200 Mound Road
Sterling Heights, Michigan 48077

RE: CONTRIBUTIONS TO CENTRAL STATES,
SOUTHEAST AND SOUTHWEST AREAS
HELATH AND WELFARE AND PENSION FUND
FOR THE FOLLOWING COMPANIES:

BANCROFT FREIGHT
ACCOUNT NO.: 0566100-0203
CENTRAL CARTAGE
ACCOUNT NO.: 1392300-0300
CENTRAL TRANSPORT
ACCOUNT NO.: 1428000-0109
DANVILLE LEASING
ACCOUNT NO.: 2046050-0100
DUNES LEASING
ACCOUNT NO.: 2392350-0103
FLINT CARTAGE
ACCOUNT NO.: 2797200-0103
GENESSE CARTAGE
ACCOUNT NO.: 3091400-0102
MCKINLAY TRANSPORT
ACCOUNT NO.: 5182300-0107
MICHIANA TRUCK
ACCOUNT NO.: 5314100-0108
MICHIGAN EXPRESS
ACCOUNT NO.: 5330700-0705
MOHAWK MOTOR
ACCOUNT NO.: 5558400-0200
QUAD STATE LEASING
ACCOUNT NO.: 6515675-0101

Appendix B

Dear Mr. Sigler:

Public Law 93-209, commonly called ERISA, requires us as the Fiduciary to make periodic reviews of participating employers contributions for the benefit of Plan Participants and their Beneficiaries.

We would like to make this review at your offices beginning the week of November 26, 1979 with a representative of Local Union No. 124.

This review will encompass the follows:

1. Determination of eligible Plan Participants covered by Collective Bargaining Agreements.
2. Verification of member history contributions.
3. Reconciliation of any account balances differences.

The records required will be the documents which support the recording of time worked and payroll computation and recording for all collective bargaining unit employees.

Our findings will be discussed with you at the completion of the review and confirmed in a written report.

If you have any further questions, please call your local Business Agent, or call Mr. John P. O'Sullivan at our toll-free number, (800) 323-2152, Extension 417.

Very truly yours,

(s) JACK YARBROUGH
ASSISTANT EXECUTIVE DIRECTOR

JY:JOP:jls

cc: Mr. John L. Sherry, Director, Financial Group
Mr. George Psaras, Director, Operations Accounting
Mr. Edward G. Lienhard, Manager, Delinquent Account/In-House Employer Audit
Mrs. Susie Mkrdichian, Manager, Accounts Receivable
Mr. John P. O'Sullivan, Manager, Field Employer Audit
Local Union Nos. 7, 20, 24, 34, 40, 100, 124, 135, 164, 299, 325, 332, 377, 406, 407, 414, 486, 527, 580, 614, 908 and 957

APPENDIX C
Title 26, Internal Revenue Code

§ 7601. Canvass of districts for taxable persons and objects

(a) General rule.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(b) Penalties.—

For penalites applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.

Aug. 16, 1954, c. 736, 68A Stat. 901

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer of employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under

oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Aug. 16, 1954, c. 736, 68A Stat. 901.

Office - Supreme Court, U.S.
FILED
SEP 8 1984
ALEXANDER L. STEVAS,
CLERK

8265

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a multiemployer employee benefit fund maintained for Union workers can force a contributing employer to disclose confidential records concerning employees the Union has determined are not performing Union work in contravention of the Trust Agreement creating the Fund and in the absence of reasonable cause to believe that a particular employee should be a Fund beneficiary.

LIST OF RESPONDENTS

Respondents, collectively styled Transport are: Central Transport, Inc., Central Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping, Inc., Michiana Trucking, Inc., Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage, Bancroft Freight Lines, McKinlay Transport, Ltd. and Genessee Cartage.

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No. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

RESPONDENTS' STATEMENT OF THE CASE

A. *The Contractual Relationships*. Transport is a common carrier of goods for hire in interstate and intrastate commerce. Transport and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its various locals ("Union") are signatories to the National Master Freight Agreement ("NMFA") and/or supplemental, individual agreements. The NMFA and its local area supplements are hereinafter collectively referred to as the "Collective Bargaining Agreement".

The Collective Bargaining Agreement creates pension and health and welfare plans for the benefit of individual Union members. The Collective Bargaining Agreement also establishes Trust Agreements which create the Funds. The Funds are entities totally separate from the labor organizations and the participating employers and are solely creatures of the Collective Bargaining Agreement.

Transport became obligated to, did make, and continues to make contributions to the Funds for the benefit of Transport employees who are *covered by the Collective Bargaining Agreement* and, therefore, who are eligible for benefits from the Funds. The Funds are charged with the fiduciary duty to receive and manage employer contributions for the benefit of Funds beneficiaries. However, the Funds have had many of their money management duties assigned to professional managers through a consent judgment with the Department of Labor, which settled allegations of gross mismanagement and assured that Funds assets would not be managed by the Funds' trustees.[1]

Each entity involved has a separate and distinct job:

1. *The Employer:* It is the job of the employer, Transport, to pay compensation to its employees. For collective bargaining unit employees, the employer pays cash wages to the employee and makes contributions to fringe benefit plan trustees for investment and management.

2. *The Union:* It is the job of the Union to make sure that every employee performing collective bargaining unit work becomes a Union member and receives all benefits of such membership — cash wages and fringe benefits. At all relevant times, anyone performing bargaining unit work must become a Union member within 30 days.

3. *The Funds:* It is the job of the Funds to receive the contributions made by the employer on behalf of the workers identified by the Union and employer as performing bargaining unit work and to properly invest and manage those monies to purchase the health and medical coverage and fund the retirement benefits for the sole and exclusive benefit of the Funds' participants.

Transport's operations are conducted by both union and non-union employees. Approximately 60% percent of

[1] The Consent Decree was issued on September 21, 1983 in *Donovan v. Fitzsimmons*, Civil No. 78 C 342 (N.D. Ill., filed 1981).

Transport's employees *are not covered by the Collective Bargaining Agreement* (an uncontroverted fact which was part of the stipulated District Court record). (See Sigler Affidavit, App. P.C. "H", pp. A-89-91).[2] As to those employees, Transport is not required to make contributions to the Funds.

All of Transport's employees who meet the ERISA definition of "participant" are entitled to participate in an employee benefit plan. On behalf of those employees covered by a collective bargaining agreement, Transport contributes to the Funds or to one of other Taft-Hartley plans. For those employees *not* covered by a collective bargaining agreement, Transport contributes to its own ERISA qualified defined benefit pension plan (the "Company Plan") which has been maintained since 1965. The result of any determination that a particular employee is performing Collective Bargaining Agreement work is to shift that employee from coverage under the Company Plan or another Taft-Hartley Plan to that of the Funds. The result to the employee, in that event, could be the forfeiture of non-vested Company Plan benefits or loss of participation in the fringe benefit plans maintained for members of a different union or different union local.

The Union and Transport determine which of Transport's employees are performing work under the Collective Bargaining Agreement and therefore are entitled to benefit contributions. The Funds are attempting to usurp this Union-employer function. The right of any worker to receive benefits administered by the Funds is determined by whether he is covered by the Collective Bargaining Agreement. Whether an employee must join the Union to be part of the collective bargaining unit is a matter of contract and state law.

The Union has always vigorously and effectively insured that all employees performing collective bargaining unit work receive all employee benefits to which they are entitled, including contributions to the Funds. The Collective

---

[2] References to the Appendix to Petition for Certiorari will be indicated by the abbreviation "App. P.C." and the appropriate subsections ("A"-"J") followed by the page number.

Bargaining Agreement specifically provides procedures to safeguard proper designation of collective bargaining unit members through union check-off lists.[3] The Collective Bargaining Agreement provides a dispute resolution mechanism to which the employer, the Union, the employees, and/or the Funds have access to determine the inclusion of an employee or group of employees in the bargaining unit and the requirement to make contributions.[4] In addition, the parties may file a unit clarification petition with the National Labor Relations Board pursuant to Section 9 of the Labor Management Relations Act ("LMRA").[5]

---

[3] See Article 3, Section 3 of the Collective Bargaining Agreement quoted at p. 30 herein. Articles 61 and 62. The Collective Bargaining Agreement provides:

> Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee *by either* the Employer, the Local Union *or the Trustees*. In the event of such referral, *the Employer shall not be deemed to be delinquent, while the matter is being considered*, but if the Conference Joint Area Committee, by majority vote, determines that contributions are required, the Employer shall pay to the Trust Fund the amounts due together with any other charges uniformly applicable to past due contributions. The Conference Joint Area Committee may also determine whether the Employer's claim was bona fide. (emphasis added).
>
> (App. "C", p. 24a).

[4] The 1979-82 edition of the NMFA to which the Petitioners in *Schneider Moving & Storage Co.* v. *Robbins*, ___ U.S. ___, 104 S. Ct. 1844 (1984) were signatories did not provide the Funds with such access although Sections 61 and 62 of the 1982-85 edition of the NMFA which was in effect when the Court heard *Schneider* expressly gave these Funds access to the grievance procedure. The amendments to the NMFA were only mentioned in footnote 9 of the Respondents' Brief on the Merits in that case.

[5] 29 U.S.C. § 159. Sections 102.60 and 102.61 of the National Labor Relations Board ("NLRB") Rules and Regulations Series 8, as amended, 29 C.F.R. §§ 102.60 and 102.61, provide specific procedures for the resolution of this type of dispute. This Court and the federal courts have consistently deferred disputes over bargaining unit composition to the particular expertise of the NLRB. *South Prairie Contracting Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). Arrangements between private parties or any arbitration decision relative to the inclusion of employees into a bargaining unit — that is, the composition of any such unit, — which is contrary to the NLRB's policies in this area, would be unlawful and unenforceable. *Houston Division of Kroger Co.*, 219 N.L.R.B. 388 (1975).

B. *The "Employees"*. "Employee" is contractually defined by Article I "Definition of Terms" Sec. 3(a) of the particular Trust Agreements to which Transport is a party as

> A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer;

The definitions of "employee" under the Funds' Pension Plan and its Summary Plan Description and under the Funds' Health and Welfare Plan and its Summary Plan Description are similar (collectively "Plan Documents"). (App. "A", p. 1a).

The Trust Agreements require employers such as Transport to furnish to the Funds such information regarding "employees" as is *reasonably required* in the administration of the Funds. The Union is likewise contractually obligated to provide the Funds with information concerning "employees" *covered by the applicable Collective Bargaining Agreement*. Neither the Collective Bargaining Agreement nor the Funds' Trust Agreements in any way require employers to furnish the Funds with employment records of *all* persons employed. Those documents *do not* authorize the Funds to audit employers' records other than those of covered employees. Furthermore, the Funds are specifically restricted to request only records which are reasonable and relevant.[6]

C. *The Audit*. On December 5, 1979, the Funds notified Transport by mail that an inspection of Transport's employment records of "*all collective bargaining unit employees*" would be made on-site at Transport's premises beginning during the week of January 14, 1980. (App. M.B.

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[6] Petitioners' Brief on the Merits, pp. 30-31. Petitioners concede that an employer can obtain injunctive relief or damages from the trustees for unreasonable audits. Reference to Petitioners' Brief on the Merits will be indicated by the abbreviation "M.B." and the appropriate page number.

"B", p. A-11).[7] A copy of that letter was sent to the appropriate Teamsters Union locals. On or about February 4, 1980 through March 28, 1980, the Funds' auditors conducted their audit of Transport's employment records. During those two months, Transport provided appropriate records of its employees who were *covered* by the applicable Collective Bargaining Agreement but refused to supply records for its employees who were not covered by the Collective Bargaining Agreement.

D. *The District Court Action.* On May 14, 1980, the Funds instituted this action seeking, among other things, a preliminary injunction requiring Transport to provide the Funds with confidential information of *all* of its employees — both those covered by the Collective Bargaining Agreement and those not covered by the Collective Bargaining Agreement. Counsel for the parties negotiated to resolve the parties' differences and conclude the audit. The Funds continued to seek disclosure of information as to all of Transport's employees without a prior determination by Transport and the Union whether those employees are actually covered by the Collective Bargaining Agreement and therefore possible (eligible) Fund members.

The Funds have claimed the following are pertinent records:

> Payroll ledgers, payroll journals, individual earnings cards, time cards, payroll check registers, cancelled payroll checks and cancelled checks used for payment of income reported on IRS 1099 forms, voucher copies of payroll checks, drivers' daily log and trip sheets, payroll manifests, delivery manifests, trip manifests, terminal drafts, cash disbursements journal, freight bills, revenue bills, billing invoices, fuel and mileage reports, drivers' settlement statements, seniority lists, dues check off lists, IRS Forms 941 and 941C, IRS Forms W-2, W-3 and W-4, IRS Forms 1099, employer's monthly and quarterly state unemployment compensation tax and

---

[7] Reference to the Appendix to Petitioners' Brief on the Merits will be indicated by the abbreviation "App. M.B." and the appropriate subsections ("A"-"B") followed by the page number.

wage reports, annual reports to the Interstate Commerce Commission, Department of Labor statistical log and summary of occupational injuries and illness, personnel files, attendance records, accounting records for distribution of payroll costs, payroll account reconciliations, workman's compensation records, notices of employee separation, monthly reports to any employee benefit plan, computer files including magnetic data base and printed reports containing above information, and corporate tax returns.

(App. "B", p. 16a).

On August 25, 1980, Transport filed its Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be Granted pursuant to 12(b)(6) of the Federal Rules of Civil Procedure. (Docket Entry No. 5). Transport contended that the Funds have neither a statutory nor a contractual right to audit the voluminous data demanded. The Funds, in response, brought a motion cast in the alternative as one for partial summary judgment and/or preliminary injunction. (Docket Entry No. 8). The parties agreed that the relevant facts were not in dispute. Treating the parties' motions as cross motions for summary judgment, the District Court granted the Funds' Motion on October 19, 1981, *thereby allowing the Funds complete access to all of the records of all of Transport's employees.*

No determination of delinquency in contributions has been made. Although the Funds assert that their audit uncovered delinquencies, Transport asserts that it has made all contributions in full.

E. *The Sixth Circuit Court of Appeals Decision.* Recognizing that in the absence of reasonable cause the audit function could be used by the Funds to harass employers, the Sixth Circuit correctly decided that the Funds had not alleged or presented sufficient evidence to justify an audit of all employee records and in an unanimous opinion written by Judge Cornelia Kennedy reversed the trial court decision. The Sixth Circuit correctly held, *inter alia,* that (i) no contractual or statutory right to inspect records of non-covered employees exists, (ii) analogies to collective bar-

gaining and NLRB disclosure rules cases are inapposite, (iii) the Funds are protected from liability if they do not review such records, (iv) the employees have adequate means through individual actions, the Union and the Secretary of Labor to prove they should be covered by the Collective Bargaining Agreement, (v) a prudent man would not expend Funds' money to launch an audit of the records of all of Transport's employees under these facts, and (vi) the decision to commence such an investigation would be arbitrary and capricious and the expenditure of money for such an investigation unreasonable. The Court did, however, grant the Funds the right to investigate the records of those four employees not on the Union seniority list for which the Funds had "reasonable cause" to believe were covered employees. *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983).

The Funds have petitioned this Court to allow the Funds to demand and investigate confidential records of employees who have not collectively bargained for such disclosure without reasonable cause to believe that those employees are covered by the Collective Bargaining Agreement.[8]

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[8] The Statement of the Case presented by Petitioner is impermissively argumentative and replete with facts not in evidence, assertions not made below and misleading characterizations of Congress' intent and the Court of Appeals' reasoning. Length limitations prevent a complete list of improper claims. The following is a representative list: Payment record of a "significant number of employers", importance of data verification in generally accepted auditing standards, (M.B., p. 3); Congressional delegation of power to trustees (M.B., p. 5); funds as functional equivalents of the Tax Commissioner; Sigler's Affidavit was "without any substantiation" (M.B., p. 7); Transport only gave records the Funds already had; auditors determined delinquencies (M.B., p. 8); *over-payment* for four employees illustrated how employees could be purposely *excluded* (M.B., o, 8); "random general audits" are the "single most reliable and effective means of uncovering delinquent contributions (M.B., pp. 11-23); employer determines employees covered by the collective bargaining agreement (M.B. p. 12); "self reporting" is required due to the Funds' size, Funds cannot physica.ly monitor reporting, all discussion of under-reporting, non-reporting and calculation example (M.B., p. 13); audits are designed to avoid privacy intrusion, review of certain forms is minimally required, auditor's objective is to assure complete

(Footnote 8 continued on page 9)

SUMMARY OF ARGUMENT

I. THE COLLECTIVE BARGAINING AGREEMENT, TRUST AGREEMENTS AND ALL PLAN DOCUMENTS RESTRICT INSPECTION RIGHTS TO EMPLOYEES COVERED BY THE COLLECTIVE BARGAINING AGREEMENT.

Article III, Section 5 of the Trust Agreements limits the records that the Funds' trustees may inspect, to those of "employees" as defined in the Trust Agreement. (App. P.C. "F" p. A-46). *All* documents, including the Plan Documents unilaterally drafted by the Funds' trustees, define participant as an employee covered by the Collective Bargaining Agreement. (App. "A", p. 1a).

ERISA's definition of employee is all encompassing. It includes "any individual employed by an employer." 29 U.S.C. § 1002(6). The Trust Agreements' definition is narrower because the Funds' benefits were not meant to be given to everyone — only to bargaining unit employees identified as such by the Union and employer. That is what the Union and Transport agreed in collective bargaining. The ERISA definition is broader, because it is used to assure that no employee of an employer can be discriminatorily denied *a* welfare benefit *if* the employer provides benefits to his employees. At the employer level, the ERISA definition of employee includes (1) employees of Transport who are covered by the Collective Bargaining Agreement and are therefore participants in the Funds, (2) employees of Transport who are covered by a different collective bargaining agreement and are therefore participants in a Taft-Hartley plan other than these Funds and (3) employees of Transport who may qualify for participation in the Company Plan — a single employer sponsored defined benefit plan for non-union employees. The Trust Agreement definition of employee is narrower than the ERISA defini-

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(Footnote 8 continued from page 8)
employee population, procedures auditor follows, permitting employer to delete confidential matters (M.B., p. 14); and "significance" of certain tax forms, discussion of owner-operators, auditor spot check procedures, limitation of audit to essential records, confidentiality safeguards from *another* case (M.B., p. 15).

tion because it describes only that portion of Transport's employees identified under number (1) above.

Congress did not intend to abrogate valid collective bargaining agreements. Congress did not say that every employee of an employer must be a participant in every benefit plan contributed to by the employer. Congress merely said that an employer cannot discriminate against an employee. The issue in this case may be disposed of by reference to the Collective Bargaining Agreement, Trust Agreements and Plan Documents.

II. ERISA DOES NOT CREATE A POWER IN THE FUNDS TO CONDUCT OVERREACHING AUDITS.

The Funds admit that the language of ERISA does not grant them the power to investigate records of non-participants. (M.C., pp. 19; 24). The Funds therefore resort to argue that such a power can be implied from their fiduciary duties under 29 U.S.C. § 1104(a) and their obligations to administer the Plans.

A. The Fiduciary Duty Rules of ERISA Neither Require Nor Authorize Unrestricted Audits of Employer Records.

ERISA demands that trustees act solely in the interests of plan "participants and beneficiaries". 29 U.S.C. § 1104(a)(1). Participants under ERISA are employees who are eligible to receive a benefit from the benefit plan. 29 U.S.C. § 1002(7). The Funds' trustees owe no fiduciary duty to those employees who do not meet the definition of "employee" in Article I, Section 3 of the Trust Agreements since they are not participants for purposes of ERISA.

The Funds' trustees' fiduciary duty owed to participants must be exercised within the prudent man standard. The prudent man standard does not sanction fishing expeditions to attempt to expand the class of participants in the Funds.

B. Congress Did Not Intend to Create Quasi-Federal Agencies of Private Parties.

The Funds equate themselves with the Internal Revenue Service and the Department of Labor because those agen-

cies enforce federal statutes and the Funds can sue employers for delinquent contributions under ERISA. The Funds request that this Court declare them to be "federal fiduciaries" with investigative and subpoena powers equal to or greater than those of federal agencies.

Clearly, if Congress intended private trustees to be federal agencies, it would have so provided.[9] This Court has repeatedly condemned attempts, even by governmental agencies, to exercise investigative powers as wholesale fishing expeditions. *See, e.g., Donovan* v. *Lone Steer, Inc.*, ___ U.S. ___, 104 S. Ct. 769 (1984); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (declaring unconstitutional the provisions of the Occupational Safety and Health Act of 1970 (OSHA) authorizing inspectors to enter an employer's property without a warrant); *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967); *U.S.* v. *Morton Salt Co.*, 338 U.S. 632 (1950) (requiring Federal Trade Commission information requests be reasonably relevant to its investigation).

Although the Secretary of Labor under ERISA must have reasonable cause to conduct on-site audits, the Funds want to act without reasonable cause. The Sixth Circuit noted that it would be "unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records." 698 F.2d 811n.5. It is incongruous to assume that the Internal Revenue Service and Department of Labor need *express* statutory authority to act, but that private parties, like the Funds have an equal or greater power *inferred* from a statute.

C. A Duty to Audit is Not Implied Because the Funds Do Not Need it.

1. The Funds Will Not be Liable for Failure to Investigate Records of Non-Participants.

The Funds state that if they do not conduct an audit of confidential records of non-covered employees to seek out

[9] It is doubtful that such a delegation of governmental power would even be constitutional if it had been made and it would be an extraordinary exercise of judicial authority to create a *de facto* federal agency.

additional participants, the Funds' trustees themselves will be liable to all potential participants who are not so found. Nothing could be further from the truth. If this Court finds that the Funds' trustees do *not* have the power to audit those records, then they have no duty to exercise that power. But, under the Funds' theory, if this Court implies the power to investigate confidential records to seek out potential participants, the Funds must exercise it by annually auditing the records of *all* employees of the 12,000 employers who contribute to the Funds.

Even if a duty and power were found, the Funds can only be liable if they have acted arbitrarily and capriciously. Since the Funds can only exercise their powers as a prudent man, an imprudent action or failure to act by the Funds will not result in their liability as long as it is not so outrageously imprudent as to be arbitrary and capricious. Moreover, the Funds' trustees will not be liable for failing to benefit employees who do not qualify as participants under the Collective Bargaining Agreement. The expenditure of funds to conduct such an audit without reasonable cause to believe a particular employee should be a participant is an imprudent and unreasonable expenditure of trust fund monies as found by the unanimous decision of the Court of Appeals. *Central Transport* at 811. Its expenditure under such circumstances would be arbitrary and capricious. *Id.*

2. The Union and ERISA Provide Adequate Safeguards Against Employer Misconduct.

Employees are already adequately protected without implying these unwarranted powers in the Funds. The employer may be sued by the Union, by the employee or the Department of Labor and it is subject to serious financial sanctions by the Internal Revenue Service. There is simply no incentive for Transport to fail to report individuals who perform bargaining unit work: All employees should qualify for some health plan and some pension plan paid for by Transport anyway, whether the Funds' plan or other Taft-Hartley plans or Transport's Company Plan and Transport would be liable for unpaid contributions to the extent a worker has been misidentified.

3. ERISA's Auditing and Reporting Provisions Do Not Require Examination of Non-Participants' Records.

Arthur Young & Company's *amicus* brief erroneously suggests that an accountant cannot issue an ERISA opinion of Funds solvency unless the trustees can audit records of non-participants. Accounting rules are drafted to conform to federal law as it is judicially interpreted. If this Court finds that trustees cannot force the investigation of non-participants' records, the failure to do so will not be penalized by the accounting profession. Moreover, Arthur Young itself issued an unqualified opinion for the period of time in which Transport and others refused access of the Funds to non-participants' records! (App. "D", p. 32a). The *amicus* brief filed by Deloitte Haskins & Sells lays to rest the fears espoused by Arthur Young.

D. Creation of an Implied Federal Common Law Right to Audit Records of Non-Covered Employees Would Provide Disasterous Effects to Employers, Employees and ERISA Trustees.

1. The Employers: Audits of Numerous Records of Non-Covered Participants Adds an Unanticipated and Self-Defeating Cost to Trust Fund Maintenance.

If benefit plans cost more than employers can afford, employers will not maintain them or create new plans. Congress drafted the law with that practical consideration in mind. H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4682.

Many employers hire workers from several different unions, each with a different Taft-Hartley plan. Unions commonly have different Taft-Hartley plans for different geographic regions of the country. For such an employer, if each Taft-Hartley fund audits the records of all employees, the costs in personnel, time and money will cripple the company.

2. The Employees: Investigations of Records of Non-Covered Employees Will Engender Large Amounts of Litigation.

Many employers maintain more than one benefit plan. ERISA does not require participation in *every* plan by *every*

employee; it does not favor one plan contributed to by an employer over another plan contributed to by the same employer. For employers with more than one plan, trustee investigations may merely result in removing a targeted employee from one plan and placing him in another. The power to conduct these investigations is not aimed at fulfilling a fiduciary obligation to new participants. It is an attempt to make the Funds even larger and to give them the weapon of unrestricted audit to coerce employers into financial settlements of alleged delinquent contributions.

The threat is real. Central States is presently demanding records from employers on the strength of the *Central Transport district court* opinion without advising the employers that the trial court decision has been reversed! (App. "E", p. 34a). The trustees of these Funds have not demonstrated that they deserve such unbridled power.

Transport maintains a single-employer sponsored, ERISA qualified, defined benefit pension plan. All full time employees who meet an ERISA approved definition of participant are eligible to participate, except for union employees who receive a benefit under a Taft-Hartley pension plan to which Transport contributes. A participant must complete 10 years of covered service as a qualified participant to receive a vested pension. If a participant with 9 years of credited service in the Company Plan is removed to become a participant in the Funds, he will forfeit his 9 years of credit. That has little to recommend it.

If ERISA implies a fiduciary duty in all ERISA trustees to conduct audits designed to *add* additional participants to their respective plans, the trustee of any plan in which the targeted employee *presently* participates must have a competing implied fiduciary duty to *resist the loss* of a participant to the plan which that trustee administers. The power the Funds seek will lead to lawsuits between trustees who will be fighting over whether an employee is a participant in their respective plans.

Additionally, if a Taft-Hartley trustee can assert that a participant of another Taft-Hartley plan belongs in his plan, the symmetry between collective bargaining agreements and the compensation they require will be destroyed. The inves-

tigating trustee will sue the employer for past due contributions. The employer may not be able to pay the plaintiff trustee due to the LMRA § 302, 29 U.S.C. § 186. Therefore, the employer will file an affirmative defense that he has a collective bargaining agreement requirement to pay contributions to the employee's present plan. Ultimately, the trustees will litigate among themselves. Of course, the local unions will have to be made parties as well since the duty to contribute to a Taft-Hartley plan must be the result of collective bargaining. The result is a massive increase in litigation.

3. The Trustees: Implying a Duty to Investigate Records of Non-Covered Employees Will Create a Staggering Burden and Certain Liability Upon Unsuspecting Trustees.

If tne power to audit is implied in ERISA, it has been implied since ERISA was effective in 1975, not merely since the Funds concocted their theory! If this Court finds an implied power and if the Funds will be liable for non-exercise of that power, the Funds will have practically admitted the liability of every ERISA trustee for its failure to audit non-participants' records for over *ten years* — even though the trustees did not know they had the power! Assuming some records indicate contributions are unpaid, the courts must identify which of numerous past employers is liable. Difficult questions of successor liability for delinquent contributions will flood the courts.

If trustees owe a fiduciary duty to potential participants, the trustees cannot be content with a partial audit. If they audited 90% of Transport's non-covered workers, they would have violated their fiduciary duty to "potential participants" who may be found in the untested 10%. Similarly, if they audited 100% of the employees of 90% of the 12,000 employers who contribute, they will have violated their duty to the employees of the 10% of the employers they did not audit. If a duty is implied to undiscovered potential participants, fulfillment of that duty will be nearly impossible.

III. THE SIXTH CIRCUIT'S REASONABLE CAUSE STANDARD STRIKES THE PROPER BALANCE BETWEEN THE FUNDS' INFORMATIONAL NEEDS AND ESTABLISHED PRIVACY INTERESTS.

The "reasonable cause" standard enunciated by the Court of Appeals properly balances the Funds' fiduciary obligations against competing privacy issues. It is in keeping with *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), that the Funds' trustees not be able to investigate the records of *all* of Transport's employees, the majority of whom are *not* covered by the relevant Collective Bargaining Agreement and are *not* beneficiaries of the Funds, against the interest of Transport and its non-bargaining unit employees in maintaining the confidentiality of the employment records.

ARGUMENT

I. THE COLLECTIVE BARGAINING AGREEMENT, TRUST AGREEMENTS AND ALL PLAN DOCUMENTS RESTRICT INSPECTION RIGHTS TO EMPLOYEES COVERED BY THE COLLECTIVE BARGAINING AGREEMENT.

Article III, Section 5 of the Trust Agreements provides as follows:

> Production of Records — Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its *employees*, the Social Security numbers, the hours worked by each *employee* and past industry employment history in its files and such other information as the Trustees may *reasonably* require in connection with the administration of the Trust. (emphasis added).

The Funds rely on the closing language of Section 5 to support their contention that they may audit the records of *all* Transport employees. The Funds can only require files and other information pertaining to "employees". "Employee" is defined in Article I, Section 3 of each Trust Agreement as:

> (a) A person who is employed under the terms and conditions of a collective bargaining agreement en-

> tered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; [10]

The Trust Agreements recognize that the benefit plan provisions pertain to a limited class of employees — those *covered* by the applicable Collective Bargaining Agreement. Thus, the Trust Agreements do not grant the Funds the right to inspect Transport's employment records with regard to *all* its employees, but only those employees *covered* by the Collective Bargaining Agreement which creates Transport's obligation to contribute to the Funds.

Judge Kennedy's well-reasoned opinion for the unanimous court below found that:

> The definition of employee in Article I, section 3(a) is written in the conjunctive. A person is an employee under the trust agreements if he or she is employed under the terms and conditions of a collective bargaining agreement *and* is a person, *i.e.*, a covered employee, on whose behalf payments are required by the collective bargaining agreement.

698 F.2d at 807-08.

The Court of Appeals noted that whether the definition of "employee" in Article I, Section 3 encompasses non-covered employees for purposes of the right to inspect a contributing employer's records had previously been considered by the Eighth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981).[11] After carefully examining the provisions of Article I, Section 3 and Article III, Section 5 of the Trust Agreements, the Eighth Circuit ruled that the trustees' right of inspection was limited to those employees

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[10] The full text of Article I, Section 3 is set forth in App. P.C., "F", p. A-43. See also the definition of "employee" the Funds' trustees drafted in the Pension Plan document. (App. "A", p. 1a).

[11] Contrary to the assertion of the trustees, (M.B., p. 23 n. 21), *CRST* was not substantially overruled with respect to this issue by the *en*

(Footnote 11 continued on page 18)

of *CRST* who were "employees" within the meaning of Article I, Section 3. The reasoning of the Eighth Circuit on this point was specifically adopted by the Sixth Circuit. 698 F.2d at 808.

The decision of the Sixth Circuit is also consistent with NLRB decisions. The NLRB has consistently held that Taft-Hartley trustees must exercise their authority within the parameters of the applicable collective bargaining agreement. The NLRB has condemned attempts to alter the duties of collective bargaining parties as efforts to effectuate unilateral changes which would undermine the integrity of the collective bargaining process. *See, e.g., Truck Drivers Local Union No. 449, (Universal Liquor Corp.)*, 265 N.L.R.B. 1539, *enforcement denied sub nom., NLRB* v *Truck Drivers Local Union No. 449*, 728 F.2d 80 (2d Cir. 1984)[12]; *Warehousemen's Union Local 334 a/k/a Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, (Halle Brothers)*, 253 N.L.R.B. 1090 (1981), *enforcement*

(Footnote 11 continued from page 17)

banc decision of the Eighth Circuit in *Robbins* v. *Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983), *aff'd sub nom., Schneider Moving & Storage Co.* v. *Robbins*, ___ U.S. ___, 104 S. Ct. 1844 (1984). When the Eighth Circuit issued its *en banc* decision in *Robbins* v. *Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983), the Court only stated that *CRST's* decision should not be read to require arbitration prior to filing a court action:

> We hold only that the trustees may come into this court without first getting the union to invoke the machinery of arbitration. To the extent *that . . . CRST* [is] . . . inconsistent with this holding . . . [it] is overruled.

Robbins at 443. The Eighth Circuit's decision in *CRST* to the extent it concerned the meaning of Article I, Section 3 and Article III, Section 5 remains viable.

The interpretation of Article I, Section 3 and Article III, Section 5 of the Trust Agreements adopted by the Sixth and Eighth Circuits is logical, consistent with the other provisions of the Trust Agreements and supported by the rules of statutory construction. Moreover, unlike the trustees' strained reading of Article I, Section 3 and Article III, Section 5, the courts' interpretation is consistent with the "plain meaning" of those provisions as understood by the Union and Transport.

[12] Although denying enforcement to the Board's decision in *Universal Liquor*, only on the basis that the trustees had not acted as agents of

(Footnote 12 continued on page 19)

denied sub nom., NLRB v. *Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582*, 670 F.2d 855 (9th Cir. 1982)[13]; *Local 80, Sheet Metal Workers, (Turner Brooks, Inc.)*, 161 N.L.R.B. 229 (1966).

The ERISA definition of "employee" in 29 U.S.C. § 1002(6) is "any individual employed by an employer." That definition is useful only in identifying the census of persons who may be eligible for some benefit plan to which Transport contributes. In other words, it only excludes participation of all persons who do not work for Transport. It does not determine which one of Transport's plans is the plan in which a particular employee should participate. If the *Union* and *employer* intended to define "employee" as *all* employees of Transport, they could have done so in the Collective Bargaining and Trust Agreements. If the *Funds' trustees* intended to define employee as *all* employees, they

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(Footnote 12 continued from page 18)

the union under ordinary common law principles, the Second Circuit stated:

> We agree with the Board [NLRB] that the trustees, by their actions, were coercing the Employers to accept a stipulation that had the effect of creating a midterm modification in the employers' collective bargaining agreements. Had the Union engaged directly in this coercive action, it would clearly constitute a violation of §8(b)(3). . . .
>
> There being no agency relationship between the Union and the trustees who performed the coercive act, the case must fall. But this means *only* that neither the Union nor the trustees committed an unfair labor practice. Whether the trustees have the right to impose a condition under a multi-employer pension fund on an individual employer who has not agreed to the condition in this collective bargaining agreement is another question for another day. (emphasis added)

728 F.2d at 85, 89.

[13] In *Halle Brothers*, the Board stated:

> If such unilateral changes can be made after specific rejection in collective bargaining, then bargaining is undermined. Taken to its logical conclusion, even agreed upon benefits have no certainty of constancy during the contract term if such benefits can be modified by means of the ploy used here.

253 N.L.R.B. at 1091-92.

The NLRB maintains this position despite the denial of enforcement by the Court of Appeals. Thus recently in *Universal Liquor Corp.*, 265 N.L.R.B. 1539, 1544-46 (1984), the NLRB cited *Halle Brothers* with approval.

could have done so in the Plan Documents which they drafted.[14] No document contains the definition the Funds need to find.

Congress did not intend to abrogate valid collective bargaining agreements. Congress did not say that every employee of an employer must be a participant in every benefit plan contributed to by that employer. Congress merely said that an employer cannot discriminate against an employee. The issue in this case may be disposed of by reference to the Collective Bargaining Agreement, Trust Agreements and Plan Documents.

II. ERISA DOES NOT CREATE A POWER IN THE FUNDS TO CONDUCT OVERREACHING AUDITS.

The Funds admit that the language of ERISA does not grant them the power to investigate records of non-participants. (M.D. pp. 19; 24). The Funds therefore resort to argue that such power can be *implied* from their fiduciary duties under 29 U.S.C. § 1104(a) and their obligations to administer the Plans.

Transport does not dispute that a trustee can audit *relevant* employer records. Transport made those records available to the trustees. Those records disclosed whether Transport made the contributions required of it for employees covered by the Collective Bargaining Agreement and participating in the Plans. But ERISA does not give the

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[14] The trustees adopted the Trust Agreement limitation on "Employees" when the trustees themselves drafted the Pension Plan document. In fact, that document stated that "Employee . . . shall mean", eliminating any doubt that the definition sets forth the complete universe of persons who could fall within the definition. The Pension Plan documents provide,

"Employee, as used herein, *shall mean:*

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days *who is employed under the terms and conditions of a Collective Bargaining Agreement* . . . entered into between an Employer . . and a Union. . .., and on whose behalf contributions are made or are presently *required to be made* to the Pension Fund by the Employer . . . " (emphasis added).

Funds' trustees unrestricted access to records of workers who are not "employees" within the meaning of the Trust Agreements. Those employees are not covered employees and cannot be participants. The right to audit such records is not the ordinary and necessary means of fulfilling the trustees' express obligations and fiduciary duties under ERISA. A less intrusive audit will achieve the same result. The legitimate objective of the trustees of ensuring that required contributions are made to the Funds on behalf of covered employees will be satisfied under the reasonable cause standard established by the Sixth Circuit while the legitimate interest of the contributing employers and non-covered employees to conduct their affairs without undue interference will be protected.[15]

A. The Fiduciary Duty Rules of ERISA Neither Require Nor Authorize Unrestricted Audits of Employer Records.

Congress expressly required trustees to act "solely in the interests of the participants and beneficiaries". 29 U.S.C. § 1104(a)(1). The ERISA definition of participant limits the group of employees who are "participants" to those employees *who are or who may become eligible to receive a benefit under the employee plan:*

> . . . any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit of any type from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

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[15] *See* PTE 76-1, 41 Fed. Reg. 12740 (March 26, 1976) (Section I provides a class exemption to multi-employer plans from the prohibited transaction rules of ERISA and the Code which compromise or settle claims for delinquent employer contributions if such plans have made or cause to be made reasonable, diligent and systematic efforts to collect such amounts, as are appropriate under the circumstances.) Contrary to the statement of the trustees in their brief, (M.B., p. 12), field audits were not specifically approved by the Internal Revenue Service or the Department of Labor in PTE 76-1, and in fact, the only mention of field audits in PTE 76-1 is in the preamble where the Internal Revenue Service and Department of Labor refer to written comments received from the public with respect to the proposed exemption.

29 U.S.C. § 1002(7) (emphasis added). The trustees owe no fiduciary duty to those employees who are not "employees" within the meaning of Article I, Section 3 of the Trust Agreements since they are not "participants" for purposes of ERISA.

The Sixth Circuit's interpretation of ERISA is consistent with the decision of the Eighth Circuit in *CRST* which rejected the Funds' argument that ERISA places a fiduciary obligation upon the Funds to conduct an audit beyond that contractually agreed to in the Trust Agreements:

> ERISA does not expand the right of inspection beyond that contractually agreed to. The fiduciary obligations mandated by ERISA are owed only to participants and beneficiaries. 29 U.S.C. § 1104. Participants are those employees who are or who may become eligible to receive a benefit from an employee benefit plan. 29 U.S.C. § 1002(7). Non-covered employees, that is, those employees who are not "employed under the terms and conditions of a Collective Bargaining Agreement," neither are nor can be participants or beneficiaries.

CRST at 619 (footnote omitted).

The Funds' trustees' fiduciary duty owed to participants must be exercised within the prudent man standard. The prudent man standard does not sanction fishing expeditions to attempt to expand the class of participants in the Funds. The trustees are asking this Court to hold that ERISA authorizes any conduct of plan fiduciaries that may further one of ERISA's objectives.

B. Congress Did Not Intend to Create Quasi-Federal Agencies of Private Parties.

The Funds are asking this Court to appoint them as federal agencies with powers of investigation equal to or in excess of those of the Internal Revenue Service and the Department of Labor. This incredible argument proceeds as follows:

PARAPHRASE	QUOTES FROM FUNDS' SUMMARY OF ARGUMENT
(1) ERISA does not give the Funds' trustees the express power.	(1) " . . . Congress refrained from setting forth a detailed list of specific trustee powers." (M.B., p. 19).
(2) ERISA implies the power because ERISA states a lofty objective.	(2) "Under ERISA, as under the common law of trusts, trustees have *implied* powers to achieve *express* objectives." (M.B., p. 19).
(3) Federal agencies have the power and they enforce federal law.	(3) "Case law indicates that those charged with enforcing the Internal Revenue Code and the Fair Labor Standards Act are not required to accept the representations of the subject of the inquiry." (M.B., p. 20).
(4) Pensions are regulated by federal law so we have the same power as the Internal Revenue Service and the Department of Labor.	(4) "Employee benefit funds, though private, are sufficiently affected with national public interest to permit their trustees, as federal fiduciaries, to enjoy similar investigative latitude commensurate with the nature of their task so long as they can provide safeguards to protect confidentiality." (M.B., p. 20).

What the Funds' trustees fail to grasp is that the authority of the Internal Revenue Service and the Secretary of Labor to conduct such audits has been granted by *statute*. If Congress intended to give pension fund trustees the status of federal agencies with investigatory and subpoena powers co-extensive with the Internal Revenue Service and the Secretary of Labor, ERISA would have expressly so provided. Incredibly, the Funds justify requiring governmental powers of investigation because they can do their job more efficiently if they can see whatever records they want without reasonable cause. (M.B., p. 29).

Mere expediency is no justification for unwarranted power.[16] The police could more effectively prevent crime if

[16] In spite of the benefits through the reasonable cause requirement, the Funds contend that the Sixth Circuit's reasonable cause requirement

(Footnote 16 continued on page 24)

they could act without search warrants — but due process of law requires otherwise. The Funds are mere private parties with their own motives. They want this Court to arm them with the weapons of unrestricted access to confidential records. This Court has repeatedly condemned attempts, even by governmental agencies, to exercise investigative powers as wholesale fishing expeditions. *See, e.g., Donovan* v. *Lone Steer, Inc.*, ___ U.S. ___, 104 S. Ct. 769 (1984); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (declaring unconstitutional the provisions of the Occupational Safety and Health Act of 1970 (OSHA) authorizing inspectors to enter an employer's property without a warrant); *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967); *U.S.* v. *Morton Salt Co.*, 338 U.S. 632 (1950) (requiring Federal Trade Commission information requests be reasonably relevant to its investigation).

(Footnote 16 continued from page 23)

has been rejected by this Court in analogous situations. Cited for this authority are: *U.S.* v. *Powell*, 379 U.S. 48 (1964); *U.S.* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). These three decisions uphold the subpoena power of *governmental agencies* and are easily distinguishable from the instant fact situation.

First, the governmental agencies involved were explicitly granted broad powers of investigation by Congress. In *Powell*, this Court observed that § 7602 of the Internal Revenue Code confers broad investigative power on the Internal Revenue Service and it could find nothing in the legislative history of the Code which restricted that power to situations where probable cause could be shown. 379 U.S. at 53, 54. The Federal Trade Commission is also explicitly vested with broad investigative powers under § 6 of the Federal Trade Commission Act, 15 U.S.C. § 45, and thus this Court refused to imply a probable cause requirement for demanding special reports from an employer. *Morton Salt* at 649-50.

Additionally, the Secretary under the Fair Labor Standards Act is empowered to "enter and inspect such places and such records (and make such transcriptions), question such employees and investigate such facts . . . as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act . . . ." 29 U.S.C § 211(a). This Court, in light of an explicit grant of broad investigative authority, interpreted the statute as not requiring a probable cause determination. In fact, congressional authorization was considered by this Court to be a prerequisite to the exercise of the Secretary's subpoena power. This Court held that the Secretary must allege that he is proceeding with his investigation in accordance with the mandate of Congress. *Oklahoma Press*, 327 U.S. at 216.

The Funds are not even satisfied with powers equal to the federal government — they want more. The power to conduct an overreaching on-site audit would *imply* greater power for the trustees than that *explicitly* granted to the Secretary of Labor under ERISA. The Court of Appeals recognized that the Secretary's on-site subpoena authority is constrained by a requirement of reasonable cause, and thus it would be "unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records." 698 F.2d 811n.5. Congress required reasonable cause for the Secretary's on-site investigations because of the enormous potential for harassment inherent in such an investigation.[17] The possibility for harassment is far greater from the Funds' audits than from investigations by the Secretary of Labor.

C. A Duty to Audit is Not Implied Because the Funds Do Not Need It.

1. The Funds Will Not Be Liable For Failure to Investigate Records of Non-Participants.

The Funds believe they will be protected from liability to non-participants who sue the Funds for a benefit if the Funds have the power to audit records of non-participants.[18] Just the opposite is true. If this Court finds that the Funds' trustees do *not* have the power to audit the records of non-participants, they have no duty to exercise that power. If the Funds have no duty to exercise a power, they cannot have liability to an excluded employee for its non-exercise. The Funds will have insulated themselves from liability by appealing the Court of Appeals' decision. However, under the Funds' theory, if this Court finds that they *have* the power and they do not exercise it, they will be liable to any excluded employee who would have been found to be a participant by exercise of their audit power.

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[17] *See Donovan* v. *Peterson, Sullivan & Co.*, 3 E.B.C. 2139 (W.D. Wash. 1982).

[18] While no court has imposed such a requirement, the Funds and their *amici* cite dicta from *Van Gunten* v. *Central States, Southeast and*

(Footnote 18 continued on page 26)

The Funds' trustees have confused the standard of review of their power to act with the standard of review of their breach of fiduciary duty. ERISA requires the trustees to act as a "prudent man" would act in fulfilling his fiduciary duties. 29 U.S.C. § 1104.[19] But federal court

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(Footnote 18 continued from page 25)

Southwest Areas Pension Fund, 672 F.2d 586 (6th Cir. 1982). In *Van Gunten*, the court held that the trustees did not act arbitrarily and capriciously in denying benefits to plaintiff, a 6% shareholder and vice-president of the employer, because he was not a member of the bargaining unit. In dicta, the court expressly noted "to emphasize the limits of our holding", *id.* at 589, that wrongful failure of an employer to contribute for an employee should not deny the employee his pension. *Id.* Consequently, the Funds assert that to maintain the integrity of the trust, they must be able to independently ascertain whether contributions have been made for all eligible individuals.

The Funds also assert that the duty to notify participants of their account status, established in *Rosen* v. *Hotel & Restaurant Employees and Bartenders Union of Philadelphia, Bucks, Montgomery and Delaware Counties*, 637 F.2d 592 (3d Cir. 1981), creates an implied power to conduct an overreaching audit. *Rosen*, however, must be evaluated in light of its unique factual situation and, so read, does not support the necessity of using overreaching audits. Rosen was a dues-paying member of the union, and was therefore eligible for pension benefits. The trustees also knew about the employer's delinquency from 1971 through 1976 and failed to contact Rosen. Clearly then, the case merely stands for the proposition that when the trustees become aware of a delinquency in contributions, it is arbitrary and capricious not to inform the beneficiary.

[19] The legislative history is clear that ERISA places a twofold duty on a plan fiduciary:

> to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, *and in accordance with* the documents and instruments *governing the fund* unless they are inconsistent with the fiduciary principles of the section.

H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4651. (emphasis added).

Thus Congress did not intend for trustees to *go beyond* the document creating the trust or to *expand* the definitions of participants and beneficiaries in those documents in order to act as a prudent man.

decisions[20] have found trustees liable to potential beneficiaries only if their denial of benefits was "arbitrary and capricious".[21]

Further, the Funds' trustees will not be liable for failing to benefit employees who do not qualify as participants under the Collective Bargaining Agreement. This Court succinctly stated in *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982) that the common law of trusts cannot abrogate the limitations of coverage drafted into the plan documents:

> By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable federal law. The common law of trusts does not alter this obligation. Absent conflict with federal law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective-bargaining agreement.

Id. at 573-74. (citations and footnote omitted).

The final fallacy of the Funds' argument is that the integrity of the trust cannot be placed in jeopardy even if benefits must be paid where no contributions have been

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[20] The trustees mistakenly allege that a federal court may only challenge a trustees' actions if they are arbitrary and capricious. (M.B., p. 42). A court should not use the arbitrary and capricious standard when interpreting a statute. *Winer* v. *Edison Bros. Stores Pension Plan*, 593 F.2d 307, 312 (8th. Cir. 1979). Whether a right to audit is implied under ERISA and if implied can abrogate specific provisions of a Collective Bargaining Agreement is a *question of law*. The Sixth Circuit appropriately issued its opinion.

[21] The "arbitrary and capricious" standard for trustee liability was initially developed from Section 302(c)(5) of the LMRA. A trustee under the LMRA must use pension contributions "for the sole and exclusive benefit of the employees . . ." 29 U.S.C. § 186(c)(5). The courts have interpreted this provision to preclude reversing a trustee's benefit allocation unless it is arbitrary and capricious under the LMRA, *Rehmar* v. *Smith*, 555 F.2d 1362 (9th Cir. 1976), and under ERISA. *Struble* v. *New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984).

received. It is axiomatic, and indeed the Funds have even conceded, that if benefits are paid to Transport employees, Transport would be liable for the delinquent contributions. *Central Transport*, 698 F.2d at 813. The mere possibility that Transport may someday become insolvent and thus be unable to reimburse the Funds cannot support the power to conduct overreaching audits. This is especially true in light of the checks and incentives for accurate reporting that exist in the Collective Bargaining Agreement, Plan Documents and in ERISA itself.[22]

The Funds and their *amici* claim that the inability to audit payroll records of all employees will significantly curtail the collection of delinquent contributions. The only Supreme Court authority they cite is *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983). The *Jim McNeff* petitioner was a subcontractor working for a general contractor bound by the Master Labor Agreement ("Master Agreement") with the International Union of Operating Engineers ("Engineers' Union"). The Master Agreement contained clauses requiring all subcontractors hired by the general contractor to sign the Master Agreement and direct their employees to become members of the Engineers' Union. Both the Engineers' Union and general contractor insisted that McNeff sign the Master Agreement. Subsequent to the signing, all the subcontractor's employees became members of the Engineers' Union.

The Master Agreement also required employers to make contributions on behalf of each employee to the Engineers' Union Pension Fund. McNeff filed the required forms but failed to include any contributions, stating that "no mem-

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[22] As the Supreme Court recognized in *National R.R. Passengers Corp.* v. *National Association of R.R. Passengers*, 414 U.S. 453, 458 (1974):

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U.S. 282, 289, 73 L. Ed 379, 49 S Ct 129 (1929). This principle of statutory construction reflects an ancient maxim — *expressio unius est exclusio alterius*.

bers of this craft were employed during this month." The trustees requested an audit to verify these records and the employer "refused".[23] Subsequently, the trustees filed suit under Section 301(a) of the LMRA. 29 U.S.C. §185(a).

These facts indicate that reasonable cause either existed or was easily ascertainable. All employees of the subcontractor were made members of the Engineers' Union and those employees were working on the job site. It would be impossible, under the foregoing facts, that the employer was not required to remit pension plan contributions on behalf of these employees. Thus a clear violation existed which certainly provided the trustees with reasonable cause. Moreover, since the Engineers' Union was in control of the pension fund, these allegations could easily be substantiated.

2. The Union and ERISA Provide Adequate Safeguards Against Employer Misconduct.

The Funds paint the picture that unless *they* have the right to audit the employers' records of non-participants, employers would be able to keep participants ignorant of their rights. However, the Funds are careful to ignore the relationship which Congress created between ERISA's reporting requirements and the sanctions which may be imposed under the LMRA against an employer who breaches its collective bargaining agreement.

The Funds erroneously assert that Transport unilaterally determines which employees are covered by the Collective Bargaining Agreement and are therefore eligible for benefits under the Trust Agreements. The fact, of course, is that the Union and Transport through the collective bargaining process have specified in the Collective Bargaining Agreement those categories of employees covered by the Agreement who may be participants in the Funds, *i.e.*, the bargaining unit. The actual list of participating employees is first determined by the *Union*, not Transport. Article 3, Section 3 of the Collective Bargaining Agreement provides:

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[23] In fact, the employer "purported to agree but postponed the audit several times," and the audit never took place. *Jim McNeff* at 1755-56.

> The Local Union shall certify to the Employer in writing each month a list of its members working for the Employer who have furnished to the Employer the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted for such month from the pay of such member, and the Employer shall deduct such amount from the first paycheck following receipt of statement of certification of the member and remit to the Local Union in one lump sum. The Employer shall add to the list submitted by the Local Union the names of all regular new employees hired since the last list was submitted and delete the names of employees who are no longer employed. Check-off shall be on a monthly or quarterly basis at the option of the Union.

The NLRB has repeatedly held that federal labor policy *requires* that the integrity of the collective bargaining process should not be undermined. *Universal Liquor*, 265 N.L.R.B. 1539 (1984). Any attempts by the Funds to modify the employee group covered by the Collective Bargaining Agreement, *i.e.*, the participants, would be contrary to federal labor policy.

The Union, through its stewards and other agents and in fulfillment of its duty of fair representation, monitors employer compliance with all provisions of the Collective Bargaining Agreement, including the rights of employees in the bargaining unit to be participants. In the present case, the Union monitors compliance with the Collective Bargaining Agreement by having Union stewards present at Transport's various places of business to insure that all Union employees are treated in accordance with the Agreement and are placed on the bargaining unit's seniority list.[24]

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[24] The existence of the employer union mechanism for determining coverage of employees — a mechanism based upon the competing and sometimes adverse interests of unrelated and distinct parties — assures the Funds that Transport contributes to the Funds in accordance with the Collective Bargaining Agreement. The Union also has incentives to insure workers are properly classified. The Union owes its members the duty of

(Footnote 24 continued on page 31)

Transport posts the seniority lists at home terminals, where they are subject to the scrutiny of the employees. When a dispute arises between the Union and Transport whether a particular employee is covered by the Agreement, the parties to the Agreement follow the grievance and arbitration procedures for resolution of the dispute.[25] Also an employee, again at no cost, may file an unfair labor practice charge with the NLRB against the employer for failure to comply with the Agreement by failing to make the requisite contributions.[26]

(Footnote 24 continued from page 30)

fair representation. *Steele* v. *Louisville & N. R.*, 323 U.S. 192 (1944). Matters relating to the administration of a collective bargaining agreement are within the duty of fair representation. *Retana* v. *Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, AFL-CIO*, 453 F.2d 1018 (9th Cir. 1972). This duty does not end when collective bargaining agreements have been executed. *Conley* v. *Gibson*, 355 U.S. 41 (1957).

[25] Failure by the union to process a grievance on behalf of the employee would constitute a breach of its duty of fair representation. This Court long ago imposed sanctions on unions which disregard such duties and provided remedies for the victims. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The employee would not have to utilize his own resources in order to prosecute the union, if the latter refuses to process his grievance. Congress, through the creation of the NLRB, insured that the government, not the employees, would finance any such litigation. Thus, if the union disregards the employee's grievance, the employee would file, free of charge, an unfair labor practice charge with the NLRB. The NLRB has consistently held, with court approval, that a union which fails to investigate the merits of a grievance or complaint from a unit member (irrespective of union membership) with respect to a violation of the collective bargaining agreement violates its duty of fair representation. *See e.g., Massachusetts Laborers' District Council*, 230 N.L.R.B. 640 (1977); *United Steel Workers of America, Local 8093, AFL-CIO-CLC (Kennecott Copper Corp.)*, 225 N.L.R.B. 802 (1976); *Western Exterminator Co.*, 223 N.L.R.B. 1270 (1976); *International Association of Machinists and Aerospace Workers, Local Union No. 697, AFL-CIO (H.O. Canfield Rubber Co. of Virginia Inc.)*, 223 N.L.R.B. 832 (1976).

Last year in *Bowen* v. *U.S. Postal Service*, 459 U.S. 212 (1983), this Court resolved the question of the allocation of backpay between the employer and the union in a breach of duty of fair representation case.

[26] Such failure by the employer constitutes a unilateral change in terms and conditions of employment violative of §8(a)(5) of the LMRA. 29 U.S.C. §158(a)(5). The remedy would be to pay the contributions in question and to make the employees, victims of the violation, whole for any damages suffered. *NLRB* v. *Strong*, 393 U.S. 357 (1969); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967); *NLRB* v. *Katz*, 369 U.S. 736,

(Footnote 26 continued on page 32)

The Funds assert that they cannot rely on the Union to represent an individual employee who claims he should be part of the bargaining unit because the Union owes a duty of fair representation to the bargaining unit as a whole and may sacrifice the good of the individual for the good of the collective whole. (M.B., p. 38). The Funds say they are different — they owe a fiduciary duty to each and every non-covered employee.[27] If so, the Funds' trustees cannot be content with a partial audit. If they audit 90% of an employer's non-covered workers, they will have violated their fiduciary duty to "potential participants" who may be found in the untested 10%. Similarly, if they audit 100% of the employees of 90% of the 12,000 employers who contribute to the Funds, they will have violated their duty to the employees of the 10% of the employers they do not audit.

The Funds concede that the Collective Bargaining Agreement specifies the classifications of employees covered by the Agreement and thereby defines the bargaining unit and the employees who are entitled to participation. An employee would be able to determine whether he is participating in the Fund by simply reading his Collective Bargaining Agreement.

Since every full time employee who meets the ERISA definition of employee is capable of participating in some plan maintained by or contributed to by Transport, receipt by the employee of an ERISA notice placing him in the single employer medical plan or pension plan would put the employee on notice that he is not a participant in the Union sponsored plans. Further, the failure to receive ERISA reports from the Funds would put a covered employee, *i.e.*,

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(Footnote 26 continued from page 31)

743 (1962); *Peerless Roofing Co.* v. *NLRB*, 641 F.2d 734 (9th Cir. 1981). Any "person", a term which includes anyone — employee, employer, union, *trust fund*, etc. — may file an unfair labor practice charge with the NLRB. LMRA §2(1), 29 U.S.C. §102(1).

[27] *But see Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 E.B.C. 1726 (D.D.C. 1982), wherein the court found that Taft-Hartley fund trustees must act in the best interests of the participant class as a whole.

a participant, on notice that he is not being reported — the evil which the Funds allegedly seek to avoid through general audits. Employees are keenly aware of the benefits their co-workers enjoy; they will know if another employee is receiving a benefit they do not receive.

An employee himself may request that the trustees investigate his records.[28] The employee's concerns about unauthorized disclosure of records would then be moot. The questions remaining would be whether a prudent man would expend the time and money necessary to investigate that employee's records and whether Transport's interest in maintaining the confidentiality of its personnel files outweighs the importance of the trustees' desire to audit the records of that particular employee.

The Funds concede they have the obligation under ERISA to provide summary plan descriptions, amendments thereto and benefit status reports to participants on a regular basis. 29 U.S.C. §§ 1022, 1024, and 1025. Indeed, Congress mandates that those notices be understandable and that they be posted in the work place so that the affected employees become aware of their rights to proper notice. It is therefore extremely unlikely that an employee who has not received any such reports from the Funds would nevertheless believe that he is a participant and therefore would present the Funds with a claim for benefits.

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[28] It is quite proper to place a portion of the reporting burden on employees. In *Nichols*, 3 E.B.C. at 1732n.4, a case heavily relied upon by the Funds, the district court found that reciprocal agreements between pension trusts in different regions which placed some of the responsibility to report hours worked on the employees were not arbitrary and capricious uses of trustee authority. Under the *Nichols* agreements, employees were sent schedules of hours worked and asked to correct any inaccuracy. The burden on employees of Transport would be far less than that placed on the employees in *Nichols*. Transport's employees would not be required to examine the number of hours that they have worked, but rather only to ascertain whether they are, or should be members of the bargaining unit. Moreover, the Funds quote extensively from *Nichols* to allege that the prudent man standard requires certain actions to verify participation. *Nichols* required the trustees to speak to the employer and participants and not to non-covered employees as the Funds would have this Court believe. *Id.* at 1732.

In addition to the contractual mechanisms for determining coverage, ERISA and the Internal Revenue Code provide methods for insuring the accuracy of Transport's reporting as well as potent sanctions for failing to report accurately. ERISA grants the Secretary of Labor broad authority to investigate whether any person has violated or is about to violate any provisions of Sections 2 through 514 of ERISA. 29 U.S.C. § 1134. The Secretary, acting on the complaint of the Funds, Union, or any participant, can inspect Transport's employment records for ERISA violations. *See* 29 C.F.R. § 2560.502-1. The Internal Revenue Code § 4971(a)[29] imposes a tax of five (5%) percent on the amount of an employer's accumulated funding deficiency. A funding deficiency could occur if contributing employers, such as Transport, fail to make proper contributions for an employee on whose behalf the Collective Bargaining Agreement required a contribution. I.R.C. § 412. If an employer fails to pay an accumulated funding deficiency within 90 days after the date of mailing a deficiency notice, an additional tax equal to 100% of the accumulated funding deficiency could be imposed upon the delinquent employer. I.R.C. § 4971(b). In the case of multi-employer plans, such as those administered by the Funds, the delinquent employer, and not the plan administrator, is liable for the tax. I.R.C. § 413(b)(6).

There is simply no incentive for Transport to fail to report individuals who perform bargaining unit work: All employees should qualify for some health plan and some pension plan anyway, whether the Funds' plans, other Taft-Hartley plans, or Transport's single-employer plan; and Transport would also be liable for unpaid contributions to the extent a worker has been misidentified.

3. ERISA's Auditing and Reporting Provisions Do Not Require Examination of Non-Participants' Records.

Arthur Young & Company's ("AY") *amicus* brief suggests that ERISA's auditing and reporting provisions require examination of non-participants' records by the

[29] References to "I.R.C. § " are to corresponding Sections of the Internal Revenue Code of 1954.

Funds or AY would have to qualify their annual opinion concerning the Funds' solvency. That is not true legally or factually: *First*, accounting rules are formulated to conform with statutory requirements. If this Court finds that ERISA trustees do not have the power to audit records of non-participants, accounting rules will be altered to avoid "penalizing" trustees by issuance of a qualified opinion from their accountants for not exercising a power they do not have. *Second*, if AY must issue a qualification to its opinion if the Funds' trustees do not audit non-participants' records, AY should have qualified its 1981 and 1982 annual report due to the refusal of Transport and others to permit the audit of non-participant records prior to and during that year. AY instead issued an *unqualified* opinion. (App. "D" p. 32a).

The *amicus* brief of Deloitte Haskins & Sells dispells the false fears raised by AY and sets into proper perspective the limited role of the accountant under ERISA. Surely, broad investigative powers cannot be read into federal law simply to make accountants more comfortable.

D. Creation of an Implied Federal Common Law Right to Audit Records of Non-Covered Employees Would Provide Disasterous Effects to Employers, Employees and ERISA Trustees.

1. The Employers: Audits of Numerous Records of Non-Covered Participants Adds an Unanticipated and Self-Defeating Cost to Trust Fund Maintenance.

If benefit plans cost more than employers can afford, employers will not maintain them or create new plans. Congress recognized that welfare plans are voluntary and that overregulation would discourage the maintenance of plans by forcing expanded coverage upon the employer:

> Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy. However, since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon

> employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans.

H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4682.

Many employers hire workers from several different unions, each with a different Taft-Hartley plan. Unions commonly have different Taft-Hartley plans for different geographic regions of the country. For such an employer, if each Taft-Hartley fund audits the records of *all* employees, the cost in personnel, time, and money would cripple the company.[30] Two of these very Respondents have received a demand from another Teamsters Taft-Hartley Plan for records of *all* employees. Upon refusal, Quad States Leasing was thrown out of the plan and multiemployer pension withdrawal liability was calculated despite the fact that Quad States Leasing continued to make all payments. (App. "F", p. 41a).

For instance, the audit of only covered employees at Transport continued for over two months. Those employees accounted for only 40% of Transport's work force. Add to that the additional 60% of the work force the Funds wish to see plus the additional records they now demand; consider that Transport is only 16 of the 12,000 employers who operate under collective bargaining agreements with the Teamsters Union and that the pension plan administered by the Funds are only 1 of the 2,000 Pension Plans; the result is a staggering expenditure of time and money. If each plan has a duty in its annual audits to fight for the inclusion of every employee in its plan, trustees and employers will have time to do nothing but audit. Congress could never have intended that result.

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[30] The Honorable Al Ullman, ranking majority member of the House Committee on Ways and Means emphasized Congressional awareness of

(Footnote 30 continued on page 37)

2. The Employees: Investigations of Records of Non-Covered Employees Will Engender Large Amounts Of Litigation.

Many employers maintain more than one benefit plan. ERISA does not require participation in *every* plan by *every* employee; it does not favor one plan contributed to by an employer over another plan contributed to by the same employer. For employers with more than one plan, trustee investigations may merely result in removing a targeted employee from one plan and placing him in another. The power to conduct these investigations is not aimed at fulfilling a fiduciary obligation to new participants. It is an attempt to make the Funds even larger and to give them the weapon of unrestricted audit to coerce employers into financial settlements of alleged delinquent contributions. If the Funds have the power to invade the employer's records for months at a time without cause to do so, the threat of commencing such an investigation carries awesome weight. And the threat is real. Central States is presently demanding records from employers on the strength of the *Central Transport district court* opinion without advising the employers that the trial court decision has been reversed! (App. "E", p. 34a). The trustees of these Funds have not demonstrated that they deserve such unbridled power.[31]

The Funds assert that ERISA implies a fiduciary duty in all ERISA trustees to conduct audits designed to *add* additional participants to their respective plans. If so, the trustee of any plan in which the targeted employee *presently* participates must have a competing implied fiduciary duty

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(Footnote 30 continued from page 36)

a cost-benefit analysis relative to passing ERISA when he advised Congress on August 20, 1974:

> It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, *particularly for employers who generally foot most of the bill.* This would be self defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed.

120 Cong. Rec. H8702 (August 20, 1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 5167. (emphasis added).

[31] See n. 1.

to *resist the loss* of a participant to the plan that that trustee administers. The type of litigation aimed at deciding what union represents the work required to complete a particular task will be doubled by adding a similar lawsuit between plan trustees litigating over covering an employee under competing plans.

Transport maintains a single-employer sponsored, ERISA qualified, defined benefit pension plan. All full time employees who meet an ERISA approved definition of participant are eligible to participate, except for union employees who receive a benefit under a Taft-Hartley pension plan to which Transport contributes. A participant must complete 10 years of covered service as a qualified participant to receive a vested pension. If a participant with 9 years of credited service would be made a participant to the Funds, he would forfeit his 9 years of credit in the Company Plan!

Additionally, if a Taft-Hartley trustee can assert that a participant from another Taft-Hartley plan belongs in his plan, the symmetry between collective bargaining agreements and the compensation they require will be destroyed. Assume, for example, Employer executes collective bargaining agreement A with Union A for all employees performing work described in Agreement A. Among its provisions, Agreement A creates Taft-Hartley Plan A. Under its collective bargaining agreement, Union A agrees to weekly wages of $80 per week per employee in order to get a $30 per week contribution to the Taft-Hartley Plan A, for a total weekly compensation package of $110. Employer also executes collective bargaining agreement B with Union B for all employees performing work described in Agreement B. Among its provisions, Agreement B creates Taft-Hartley Plan B. Under its collective bargaining agreement, Union B insists on weekly wages of $100 per week per employee and agrees to only $10 per week contribution to the Taft-Hartley Plan B for a total weekly compensation package of $110. If the Trustees of Plan B audit Employer's records and assert that certain Union A members are doing Agreement B bargaining unit work and

sue Employer for delinquent contributions, the parties will be affected as follows:

(1) *TARGETED EMPLOYEE:* As a member of Union A and a participant in Plan B, if Trustee B is successful, Targeted Employee would receive $80 in wages under Agreement A and $10 in fringe benefits under Plan B for a total weekly compensation of $90, rather than the $110 for which he bargained.

(2) *UNION A:* Since Union A is not a party to the audit or the lawsuit, Union A will certainly not voluntarily release the employee to membership in Union B, so that Targeted Employee would be a Union A member but a Plan B participant.

(3) *TRUSTEE A:* Trustee A will either (a) receive a $30 contribution and have an implied fiduciary duty to try to retain that contribution for the benefit of Targeted Employee under Plan A by suing Trustee B and Employer or (b) not receive the $30 contribution and sue Employer for that amount.

(4) *EMPLOYER:* Employer has a contractual obligation to pay both wages and fringe benefits under Collective Bargaining Agreement A. That obligation may or may not be affected by a lawsuit to which Union A is not a party. Accordingly, Employer may have to contribute to both Plans A and B although Targeted Employee will not receive the benefit of the contribution and/or Employer may make Union A a party to the lawsuit brought by Trustee B. However, an employer may be prohibited under §302 of the LMRA, 29 U.S.C. §186, from contributing to a plan except pursuant to a written agreement, *i.e.*, the collective bargaining agreement and trust agreement.

Suffice it to say that implying the power in the trustees without addressing the possible lack of symmetry that may result between collective bargaining agreements and Taft-Hartley plans will engender litigation rather than avoid it. If

Taft-Hartley trustees need the power to audit records of non-covered participants, the power should be created by Congress by amending ERISA. Only Congress can build in the protections necessary to maintain the symmetry of the collective bargaining agreement and the Taft-Hartley plan and only Congress can provide that an employer will not be forced to contribute twice for the same employee.

3. The Trustees: Implying a Duty to Investigate Records of Non-Covered Employees Will Create a Staggering Burden and Certain Liability Upon Unsuspecting Trustees.

If the power to audit is implied in ERISA, it has been implied since ERISA was effective in 1975, not merely since the Funds concocted their theory! If this Court finds an implied power, and if the Funds will be liable for non-exercise of that power, the Funds will have practically admitted the liability of every ERISA trustee for its failure to audit non-participants' records for over *ten years* — even though the trustees did not know they had the power!

Assuming some records indicate contributions are unpaid, the courts must identify which of numerous past employers is liable. Since so much time may have passed from the date that contributions were due, difficult questions of successor liability for delinquent contributions will flood the courts. Prior employers may have changed from sole proprietorships to partnerships or to corporations or may have gone through bankruptcy or merged with other companies or been involved in any of numerous changes in control and ownership. Moreover, the Funds' trustees will create in themselves a duty to *physically find* those potential participants whose names are uncovered. Probate estates of deceased potential participants will have to be re-opened for payment of accrued benefits and beneficiaries will have to be tracked down.

All of these problems can be avoided. If this Court finds that the Funds do not have this extensive audit power under ERISA, the Funds are not liable. If Congress intended trustees to have this extensive audit power, Congress can

then amend ERISA to create that power and can provide trustee liability for *prospective* failure to exercise only or establish a reasonable claims period for allegedly excluded participants to assert their claims. But if Taft-Hartley trustees and plans are found liable for failure to exercise *implied* powers they did not know existed, many well-meaning and innocent trustees will be harmed and the financial solvency of plans threatened.

III. THE SIXTH CIRCUIT'S REASONABLE CAUSE STANDARD STRIKES THE PROPER BALANCE BETWEEN THE FUNDS' INFORMATIONAL NEEDS AND ESTABLISHED PRIVACY INTERESTS.

The Court of Appeals required the Funds to show "reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement" before the employment records of that employee may be inspected. *Central Transport*, 698 F.2d at 810 (emphasis in original). This limited right to audit will properly focus the Funds' investigation and balance the rights of employees, employers, and the Funds' trustees. Furthermore, the reasonable cause standard will actually protect the Funds from breaching their fiduciary duties by wasting Funds assets in conducting an overreaching audit. *Id.* at 811; *Scotts Abridgement of the Law of Trusts*, § 188 (1960). It will also prevent the Funds from using the threat of an expensive, disruptive, time consuming audit to force a settlement for otherwise unnecessary contributions.

The requirement of reasonable cause in *Central Transport* is consistent with this Court's recent decision in *Schneider Moving & Storage Co.* v. *Robbins*, ____ U.S. ____, 104 S. Ct. 1844 (1984). The Sixth Circuit specifically recognized the inability of the Funds to invoke the Union-employer arbitration procedure and thus gave the Funds a "reasonable cause" right of inquiry to compensate them for their lack of access to the grievance/arbitration mechanism of the Collective Bargaining Agreement. *Central Transport*, 698 F.2d at 812. That holding extends *Schneider* to its logical conclusion and balances the interests of all competing parties. The Union has an incentive to identify

all employees who are engaged in bargaining unit work. If the Funds are correct that the Union might not choose to confront an employer over the claims of a small number of employees, the employee himself may ask the Funds' trustees to review his records to determine if he is entitled to participate in the Plan. In so inquiring, the employee would have waived his right to maintain the confidentiality of his records. The only question remaining is whether there is sufficient reasonable cause to believe the employee is performing bargaining unit work for a prudent man to spend the money to conduct an audit and cause the employer to spend the time and money necessary to make the records available to the Funds' trustees.

The Funds may establish reasonable cause to investigate the records of particular employees as a result of their audit of contributions by the employer and the pertinent records of *participants* in the plans. That is how the audit of participants' records and employer contributions revealed four employees who were not on the list of persons doing bargaining unit work but for whom contributions apparently had been made. The Court of Appeals found that the Funds' trustees had reasonable cause to spend Funds money to review the records of those employees.

Schneider recognized the trustees' right to commence a proper action in federal court. How a litigant decides whether to file suit is a private matter. But once an action is commenced and the less burdensome route of arbitration is by-passed,[32] the lawsuit must be conducted under the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure give discovery rights to plaintiffs upon good cause limited by relevancy and materiality. The Funds, however, are seeking more than the Federal Rules allow. They do not want to be limited by relevancy and materiality. They do not want to show a reasonable belief that facts exist to justify filing a complaint. The Funds want subpoena rights to conduct fishing expedition audits to attempt to find facts which they have no reasonable cause to believe exist. Notably, the Funds admit in their Brief that

[32] See n. 4.

the "Central States Trust Agreements require that Trustee requests for information and records be reasonable and specifically related to the necessary and proper administration of the funds." (M.B., pp. 30-31).

The Sixth Circuit also balanced the Funds' need to audit Transport's records for probable participants against the interest of Transport and its non-bargaining unit employees in maintaining the confidentiality of the employment records of non-covered employees. The court struck the appropriate balance by finding in the trustees a

> . . . limited right of inspection and investigation . . . confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee.

Central Transport, 698 F.2d at 811.

The "reasonable cause" standard enunciated by the Sixth Circuit also balances the Funds' fiduciary obligations against *two* privacy interests, that of the employer and of the "non-covered employees who have not bargained for the intrusion" into their records. *Id.* at 812. Balancing informational needs versus individual privacy interests is mandated by a line of this Court's decisions extending from *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977) and *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455-65 (1977) through *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318-20 (1979). *See also Department of the Air Force* v. *Rose*, 425 U.S. 352, 381 (1976).

In *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318-20 (1979), the decision most similar to the present case, this Court balanced the interest of the employer and its employees in the confidentiality of tests and test scores against the asserted need of the Union to examine *all* tests and test scores in order to process employee grievances. This Court specifically recognized the interests of both

employer and employees in maintaining confidentiality. Justice Stewart, writing for the majority, stated:

> Under these circumstances, any possible impairment of the function of the Union in processing the grievances of employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed. The burden on the Union in this instance is minimal. The Company's interest in preserving employee confidence in the testing program is well founded.

Id. at 319.

Moreover, in *Detroit Edison*, this Court determined that the employer was not required to comply with the Union's request for full disclosure, without regard for the confidentiality interests of both employer and employees, even though Union requests for disclosure traditionally have been afforded wide latitude by the NLRB.[33]

In weighing the asserted confidentiality interests, Justice Stewart noted that both Congress and various State legislatures have recognized the individual's interest in preserving the confidentiality of personnel files. *Id.* at 318n.16.[34] By

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[33] Since 1941, this Court has required Federal courts to defer to the expertise of the NLRB in matters of labor relations. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). *See generally* Duff & Johnson, *A Renewed Employee Right to Privacy*, 34 Lab. L. J. 747, 755 (1983). *See also Detroit Edison Co.* v. *NLRB*, 440 U.S. at 320, 330-31 (White, J., dissenting). However, in *Detroit Edison*, Justice Stewart made clear that even in the context of labor relations cases, the Court is not required to affirm a blanket disclosure order merely upon the Union's unsubstantiated request.

[34] The Privacy Act of 1974, 5 U.S.C. § 552a, and Exemptions 4 and 6 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4),(6), protect the confidentiality of personnel records. This Court has held that Congress intended Exemption 6 to apply broadly to personal information contained in Government records. *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600-02 (1982). At present, eleven states also have enacted so called "mini Privacy Acts" which regulate access to personnel files maintained by employers. 34 Lab. L.J., *supra* note 33, at 753.

balancing the Union's claimed need to examine *all* test scores against the confidentiality interests raised by the employer, this Court approved the *conditional* disclosure which the employer had offered but the Union had stubbornly rejected. Moreover, this Court denied the Union unfettered access on a finding that the Union had provided no mechanism for protecting the confidentiality of test scores and there was no sanction for unauthorized disclosure. *Id.* at 315.

Thus, it is at least implicit in the previously cited decisions that the trustees have the burden of proving that they can preserve the confidentiality of non-covered employee records to which they seek access.[35] The Funds have proposed no mechanism for protecting the legitimate confidentiality interests of Transport and the majority of its

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[35] Congress recognized the significant public interest in access to information retained by the government by passing the FOIA, 5 U.S.C. § 552 (1966). However, Congress created specific exemptions to disclosure among which are Exemption 4 (commercial and financial records) and Exemption 6 (personnel files). In 1974, Congress reacted to an increasing public concern for the privacy rights of individual citizens which may be threatened by disclosure of information in government files by passing the Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a. The Privacy Act expresses the finding of Congress that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States." 5 U.S.C. § 552a (Congressional Findings and Statement of Purpose) (1974).

Consequently, courts that have decided whether personal information should be disclosed pursuant to FOIA requests have necessarily considered the FOIA exemptions and/or the Privacy Act and have balanced the supposed need for information against the privacy interest. *See, e.g., U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980); *Wine Hobby U.S.A., Inc. v. Internal Revenue Service*, 502 F.2d 133 (3d Cir. 1974); *Local 2047, American Federation of Government Employees v. Defense General Supply Center*, 423 F. Supp. 481 (E.D. Va. 1976) aff'd. 573 F.2d 184 (4th Cir. 1978). A first consideration has been whether there is a *public interest* purpose in securing the information. Disclosure was denied in *Wine Hobby* on a finding that the requesting party asserted *no public interest purpose*, so that the invasion of privacy was "clearly unwarranted." 502 F.2d at 137. In the present case, the trustees have asserted no public interest purpose that outweighs privacy interests.

If there is a public interest purpose and the information sought is protected by either FOIA exemptions and/or the Privacy Act, the courts consider whether the *public interest* outweighs the privacy intrusion and

(Footnote 35 continued on page 46)

employees. The Funds are *not* subject to sanctions for unauthorized disclosure of confidential information. The Funds have *no* "unblemished record for discretion." *See Nixon* v. *Administrator of General Services*, 433 U.S. 425, 462 (1977) (citation omitted). There is no guarantee that the Funds will maintain the confidentiality of non-bargaining unit employees' files and, in fact, the Funds have every incentive to share information with the Union to increase the size of the bargaining unit.[36].

The risk to Transport of either deliberate or inadvertent disclosure is significant and obvious. Trustees of the Funds

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(Footnote 35 continued from page 45)

whether the information can be provided with minimal intrusion. *See Informational Privacy and Public Records*, 8 Pac.L.J. 25, 33 (1977). In *Westinghouse*, the court concluded that the public interest was substantial and the intrusion, minimal, but still conditioned disclosure on *prior notice* to affected employees who were allowed to raise their own privacy challenges. 638 F.2d at 579, 581. In *Local 2047*, the court refused to allow disclosure of personnel information to a union, *without individual consent*, even though the collective bargaining agreement between employer and union specifically authorized disclosure of such information, which was relevant to the union's function, and even though there is a valid public interest in honoring collective bargaining agreements. 423 F. Supp. at 481, 484, 486. In the case at bar, the trustees claim a unilateral right to abrogate the collective bargaining agreement by imposing a plan on an employee regardless of what his union may have agreed to in the collectively bargained contract.

Senator Harrison Williams pointed out in his explanation of ERISA to the Senate that the Social Security Administration furnishes employment data to multi-employer plans, such as the Funds in the present case, to help these plans fulfill their statutory obligations to furnish plan information to participants. However, Senator Williams noted that the Social Security Administration furnishes employee information *only pursuant to employee authorization*. 120 Cong. Rec. S29931 (daily ed. Aug. 22, 1974). Prior authorization for release of employment information must come, at a minimum, from the persons affected, *i.e.*, the employees, but the trustees do not provide even this threshhold safeguard.

[36] A noted commentator observed:

> The major practical problem for many in the joint fund and labor relations field is that they wear two hats . . . . Quite frequently the very same individuals who negotiate at the collective bargaining table for the union are the union trustees.

N.A. Levin, *Guidelines for Fiduciaries of Taft-Hartley Trusts, An ERISA Manual*, (International Foundation of Employee Benefit Plans, 1980) p. 124.

include both Union members and representatives of employers who compete with Transport. Disclosure of names, addresses, employment terms, wage rates, bills of lading, contracts with independent contractors and the like would be beneficial to Union organizers and could seriously jeopardize the integrity of Transport's business operations. Competitors could easily use wage information concerning Transport's management personnel to lure key managers with higher salary offers and contract information to offer contracts to the same independent contractors at a more advantageous price. In view of the Funds' inability to provide the kinds of assurances this Court has required to safeguard confidentiality, the Sixth Circuit's limited disclosure standard should be affirmed.

The Sixth Circuit's "reasonable cause"/limited inspection standard should also be affirmed in the interest of Transport's non-covered employees who are asked to suffer an intrusion for which they did not bargain. The investigation sought by the Funds does *not* extend to a small fraction of confidential material, a factor which this Court found significant in *Nixon* v. *Administrator of General Services*, 433 U.S. at 455-65. Rather, the Funds' investigation is all-encompassing, and the material requested is not *relevant* to the trustees' duties.[37]

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[37] Relevance is an important consideration in records disclosure cases. *See, e.g., NLRB* v. *Rockwell-Standard Corp., Transmission and Axle Division*, 410 F.2d 953 (6th Cir. 1969); *Kroger Co.* v. *NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

On appeal to the Sixth Circuit, the trustees argued that the disclosure standard applicable to LMRA cases is directly analogous to the present factual situation. The court below correctly found that the standard of disclosure in labor relations, involving information relevant to bargainable issues, is distinguishable from the present case, and further that even were the standard analogous, the trustees must bear the burden of proving relevance, which they failed to do. 698 F.2d at 812-13.

Moreover, it should be noted that even in cases involving NLRB determinations relative to the disclosure standard and purportedly bargainable issues, federal courts have, as a result of this Court's decision in *Detroit Edison*, increased their scrutiny of Board-ordered disclosure relative to confidentiality and/or limited disclosure issues. *See, e.g., Atlas Metal Parts Co., Inc.* v. *NLRB*, 660 F.2d 304 (7th Cir. 1981); *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1096-98 (1st Cir. 1981); *see also*, 34 Lab. L.J., *supra* note 33, at 754-56.

The Sixth Circuit's unanimous decision was, in part, a reaction to the growing public concern with privacy. Congress recognized and responded to that concern by writing disclosure exceptions into the FOIA even though public disclosure is the Act's purpose. Furthermore, Congress enacted the Privacy Act of 1974 which imposes on federal agencies duties of confidentiality, including the duty to seek authorization from the person affected prior to disclosure of personal information. The Privacy Act also established the Privacy Protection Study Commission which, in 1977, published its opinion that the same confidentiality safeguards applicable to federal agencies should be adopted by private entities as well.[38]

In view of the clear public policy favoring privacy, it is incumbent upon the Funds to show that the massive, intrusive audit rights they seek are justified by more than the accountants' desire to sift through the enormous amount of records which Petitioners call "pertinent" to the audit. This, they have not done. Moreover, the Funds have not and cannot demonstrate how their interests will be prejudiced if they are required to show "reasonable cause" to conduct an audit of records for any non-bargaining unit employees.[39]

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[38] *Personal Privacy in an Information Society*, Report of the Privacy Protection Study Commission at 19, 224, 270-71 (1977). Notably, the Commission stated:

> In addition, some protective labor legislation such as the Employee Retirement Income Security Act (ERISA), [P.L. 93-406, 88 Stat. 829 (1974)] underscores the increasing importance of the employer's role as provider of social and economic benefits. Yet neither the actual requirements of such legislation, nor the regulations issued by government agencies to implement it, account for its overall impact on the collection, use, and disclosure of information about employees.

Id. at 227. Therefore, the Commission goes on to recommend:

> As the *first premise* of a responsible confidentiality policy, disclosures to any outside entity without the employee's authorization should be prohibited.

Id. at 270 (emphasis added).

[39] Courts have been reluctant to impose unreasonable burdens on trustees as part of their fiduciary obligation. In *Hopkins v. F.M.C. Corp.*, 535 F. Supp. 235 (W.D.N.C. 1982), the district court refused to require

(Footnote 39 continued on page 49)

The Funds have not and indeed cannot provide adequate safeguards against the possibility of intentional or inadvertent disclosure. In short, the Funds have failed to meet their burden of persuasion that their asserted need for information *outweighs the confidentiality interests* of Transport and its employees. Therefore, the disclosure standard enunciated below and the decision of the Sixth Circuit should be affirmed.

CONCLUSION

The power to audit confidential records of employees who do not participate in the Funds is not found in the Collective Bargaining Agreement or Trust Agreements or any of the numerous Plan Documents or in the language of ERISA. Therefore, the Funds assert that an *implied power* (auditing non-participants' confidential records) is necessary to fulfill an *implied duty* (to ferret out more participants) to an *implied beneficiary* (the new participant who *may* be found by audit. This Court should not create a federal common law audit power in the trustees. This Court should not conclude that Congress *intended* to give the Funds investigative powers co-extensive with federal agencies but *chose* not to do so expressly. This Court should not imply that power in the Funds' trustees because employees are already adequately protected through their access to the Union, to the courts, to the NLRB and through the investigative rights of the Internal Revenue Service and the

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(Footnote 39 continued from page 48)

an employer trustee to explain the impact of its pension plan requirements on individual situations. The court explained that "defendant has 17,000 employees in this plant alone; it would be practically impossible to comprehensively address all of their individual concerns unsolicited." *Id.* at 239. Similarly, the duty of conducting audits utilizing all employment records is an unreasonable burden. This Court should not impose a burden on the ERISA trustees to audit records of non-union employees in the absence of reasonable cause to believe a particular employee is misidentified.

Department of Labor. Implication of the power to investigate will result in an assault on the collective bargaining process contrary to established federal labor law. Its cost will discourage maintenance of plans. Moreover, it will place an enormous power in the hands of ERISA trustees which may be used for harrassment and which will result in trustee liability unless vigorously exercised.

The unanimous decision of the Sixth Circuit Court of Appeals properly balanced competing interests of employer, union, trustee and employee. The reasonable cause standard espoused by Judge Kennedy comports with the Federal Rules of Civil Procedure, practicality and plain good sense. That decision should be affirmed.

Respectfully submitted,

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September 7, 1984

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

RESPONDENTS' APPENDIX

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APPENDIX A

CENTRAL STATES
SOUTHEAST & SOUTHWEST AREAS
HEALTH & WELFARE FUND

Benefit Plan A

Effective April 1, 1979

Appendix A

Plan Benefits For You And Your Dependents

Participant Only

Accidental Death and Dismemberment (Chapter 2)
Total and Permanent Disability (Chapter 2)
Loss of Time (Chapter 3)

Participant, Spouse and Dependent Children to Age 19

Life Insurance (Chapter 2)
Accident and Health Benefits (Chapter 3)

- Hospital Expense Benefit
- Surgical and Obstetrical Expense Benefit
- Outpatient Diagnostic X-ray and Laboratory Expense Benefit
- Outpatient Accidental Bodily Injury Expense Benefit
- Psychiatric, Alcoholism and Drug Abuse Treatment Benefit
- Major Medical Expense Benefit

Dental Benefits (Chapter 4)
Vision Benefits (Chapter 5)

Physically Handicapped or Mentally Retarded Children Age 19 or Over

Accident and Health Benefits (Chapter 3)
Dental Benefits (Chapter 4)
Vision Benefits (Chapter 5)

Full-time Students, Ages 19 to 23

Accident and Health Benefits (Chapter 3)

Qualifications

Physically Handicapped/Mentally Retarded Children (19 or over):

Note that physically handicapped or mentally retarded children that are age 19 or over are not covered by the Life Insurance Benefit. To be eligible for Accident and

Appendix A

* * *

Definitions

Covered Participant:

An employee for whom an employer is required to make contributions to the Fund and who has met initial eligibility requirements

or

An employee covered under the Plan due to the Benefit Bank

or

An employee who is entitled to make and does make Self-Payments to the Fund.

* * *

Plan Definitions

Following are some terms used in this booklet. They are defined here as they apply to your Plan in order to aid your understanding of this booklet. The complete legal definitions of terms necessary to define your Plan are located in the Plan Document which is available for review at your Local Union.

Active Employee - You are an active employee when you are working, on paid vacation or on a strike approved by the International Brotherhood of Teamsters. You are not considered active if you are on leave of absence, sick leave, lay-off, quit or discharge.

* * *

Employee - A person covered under a collective bargaining agreement who is employed by an employer who must make contributions to the Fund. Also, a person employed by a Local Union, or a person employed by the Fund.

Employer - An employer who has a collective bargaining agreement with the union and who meets the Trustees' requirements for participation in the Fund.

Fund - The administrator of your Plan is the Central States, Southeast and Southwest Areas Health and Welfare Fund.

* * *

Participant - An employee for whom an employer is required to make contributions to the Fund; or an employee who is entitled to make and does make self-payments to the Fund, or an employee covered under the Plan due to the Benefit Bank.

Plan - Your Health and Welfare benefits. This booklet is your Summary Plan Description.

Plan Document - The legal document according to which the Fund administers the Plan. Your Local Union has a copy of the Plan Document for you to look at or you can request your own copy from the Member Service Department, P.O. Box 5044, Des Plaines, Illinois 60016. The Fund must charge you 25¢ per page for your own copy of the Plan Document.

Central States, Southeast and Southwest Areas Pension Fund

Summary Plan Description and Pension Plan

Effective July 1, 1980

(c) Your Rights Under the Employee Retirement Income Security Act of 1974 (ERISA)

As a Participant of the Central States, Southeast and Southwest Areas Pension Plan, you and other Plan Participants are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974. ERISA provides that, as a Plan Participant, you are entitled to:

— Receive a summary of the annual financial report of the Plan once a year. As modifications to the Plan are made, you will be notified.

— Examine, without charge, at the Pension Fund office and at other locations (such as Local Union halls) all Plan documents, contracts, collective bargaining agreements and copies of all documents filed by the Plan with the U.S. Department of Labor, such as annual reports and Plan descriptions.

— Obtain copies of all Plan documents and other Plan information upon written request to the Trustees. The Trustees may make a reasonable charge for the copies.

— Obtain once a year starting in 1978, a statement of your accrued pension benefits and your nonforfeitable (vested) pension benefits (if any) or the earliest date on which benefits will become nonforfeitable (vested). The Plan may require a written request for this statement, but it must provide the statement free of charge.

— File suit in a federal court, if any materials requested are not received within 30 days of your request, unless the materials were not sent because of matters beyond the control of the Trustees. The court may require the Trustees to pay a penalty of up to $100 for each day's delay until the materials are received.

The Trustees of this Plan also will tell you, upon written request, whether a specific Employer or Local Union is required to make contributions to this Plan. You may

examine a complete list of all contributing Employers, as well as other documents at the Pension Fund office. The address is given on page 37.

In addition to creating rights for Plan Participants, ERISA imposes obligations upon the persons who are responsible for the operation of the employee benefit plans. These persons are called "fiduciaries" in the law. Fiduciaries must act solely in the interest of the Plan Participants and they must exercise prudence in the performance of their Plan duties. Fiduciaries who violate ERISA may be removed and required to make good any losses they have caused the Plan.

Your Employer may not fire you or discriminate against you to prevent you from obtaining a pension benefit or exercising your rights under ERISA.

If your claim for a pension benefit is denied in whole or in part, you must receive a written explanation of the reason for the denial. You have the right to have the Plan review and reconsider your claim (see "Filing an Appeal If a Claim Is Denied" on page 30).

If you are improperly denied a pension benefit in full or in part, you have a right to file suit in federal or state court and to have legal process served upon a Plan fiduciary (see page 38). If Plan fiduciaries are misusing the Plan's money, you have a right to file suit in a federal court or request assistance from the U.S. Department of Labor. If you are successful in your lawsuit, the court may, if it so decides, require the other party to pay your legal costs, including attorney's fees.

If you have any questions about this statement or your rights under ERISA, you should contact the Trustees or the nearest Area Office of the U.S. Labor-Management Service Administration, Department of Labor.

MORE INFORMATION ABOUT THE PLAN

If for any reason you wish to contact the Plan, you may do so by writing

Central States, Southeast and Southwest Areas
Pension Fund
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631

Telephone: (312) 693-5300

If you wish to take legal action against the Plan, you may have legal process served on the Executive Director or any of the Plan Trustees. The name and address of the agent for service of legal process is:

Executive Director
Central States, Southeast and Southwest Areas
Pension Plan
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631

Central States, Southeast and Southwest Areas Pension Plan is a defined benefit plan administered by a Board of Trustees that makes all rules necessary to administer this Plan on behalf of its Participants. There are 8 Trustees on the Board of Trustees; 4 Trustees representing the Union; and 4 Trustees representing Employers.

For purposes of administering the Plan, records are kept on a calendar year basis. The Plan year and the fiscal year run from January 1 through December 31.

The Employer Identification Number (EIN) assigned to the Plan by Internal Revenue Service is 36-6514764. The Plan number assigned by Internal Revenue Service is 001.

Central States, Southeast and Southwest Areas Pension Plan

Effective January 1, 1976

As Amended to Date

Appendix A

ARTICLE I. DEFINITIONS

Section 1.01: Pension Plan or **Plan,** as used, herein, shall refer to the employee retirement benefit plan as described herein or as from time to time hereafter amended.

Section 1.02: Trust Agreement, as used herein, shall refer to the Agreement and Declaration of Trust made and entered into the sixteenth day of March, 1955, and as amended from time to time thereafter, by and between Central Conference of Teamsters, Southern Conference of Teamsters, and their affiliated Local Unions, and the Southeastern Area Motor Carriers Labor Relations Association; Southwest Operators Association; Motor Carriers Employers Conference-Central States; Cartage Employers Management Association; Cleveland Draymen Association, Inc.; and Northern Ohio Motor Truck Association, Inc.

Section 1.03: Trust Tund or Pension Fund, as used herein, shall refer to all property of whatever nature which shall be in the Trust created by the Trust Agreement.

Section 1.04: Employer, as used herein, shall mean any Employer who is now, or shall in the future be, bound by a Collective Bargaining Agreement, as hereinafter defined, with the Union, agrees to be bound by the Trust Agreement, satisfies the requirements for participation as established by the Trustees, and is formally accepted for such participation by the Trustees. An Employer shall cease such participation upon determination by the Trustees that said Employer has failed to comply with any of these conditions or any such other conditions or requirements as may be set forth in the Trust Agreement or promulgated pursuant thereto.

Section 1.05: Union, as used herein, shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated local unions, and such other unions as the Trustees may agree upon.

Section 1.06: Employee, as used herein, shall mean:

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days who is employed under the terms and conditions of a Collective Bargaining Agreement, as hereinafter defined, entered into between an Employer, as herein defined, and a Union, as herein defined, and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer; or

(b) All persons employed by the Union, as herein defined, upon being proposed by the Union and after acceptance by the Trustees, as hereinafter defined, and as to such Union personnel the Union shall be considered an Employer, solely for the purpose of contributions, within the meaning of the Agreement and Declaration of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Pension Fund at the times and at the rate of payment equal to that required by any other Employer who is party to the Trust Fund for the same benefits; or

(c) All persons employed by Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and as to such personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of the Agreement and Declaration of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust Fund for the same benefits.

(d) Effective July 1, 1973, all persons who are Trustees of Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest

Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances the common law test, or the applicable statutory definition of master-servant relationship shall control employee status.

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

Section 1.07: Trustees, as used herein, shall mean the Trustees designated in the Trust Agreement together with their successors designated and appointed in accordance with the terms of the Trust Agreement.

Section 1.08: Employer Contributions, as used herein, shall mean contributions made or required to be made by Employers to the Trust Fund.

Section 1.09: Collective Bargaining Agreement, as used herein, shall mean an agreement to which any Union, as defined herein, is a party with an Employer, as defined herein.

* * *

Section 1.17: Bargaining Unit, as used herein, shall mean that group of Employees (as defined in Section 1.06) which is employed by an Employer (as defined in Section 1.04) under the terms and conditions set forth in a Collective Bargaining Agreement (as defined in Section 1.09) to which that Employer and any Union (as defined in Section 1.05) are parties.

* * *

Appendix A

ARTICLE III. PARTICIPATION AND ELIGIBLITY FOR PENSION AND OTHER BENEFITS

* * *

Section 3.02: Covered Employment.

(a) Any employment of an Employee for which contributions to the Pension Fund are made or are required to be made on his behalf shall be considered Covered Employment if such contributions are in accordance with the rules and regulations of this Plan and Trust Agreement.

(b) Service in the Armed Forces of the United States under Selective Service or during a war or international police action (if such service was entered directly from Covered Employment and if the the Employee returned directly from such service to Covered Employment) shall be considered Covered Employment.

(c) Any employment prior to the date an Employee first became a Participant of this Plan shall be considered Covered Employment if such employment meets one of the conditions as follows:

(1) Employment within a classification of work and in an industry which was at the time of such employment normally covered by Teamster Collective Bargaining Agreements in the same local metropolitan area; and or

(2) Continuous past employment with an Employer in a classification of work prior to the date such Employer became a contributing Employer to the Pension Fund. if the Employee was employed by such Employer in the same classification of work on the date such Employer became a contributing Employer to the Pension Fund; and or

(3) Employment requiring the usual Teamster skills in the traditional Teamster Industry at the time of such employment; and/or

(4) Employment which was covered by Teamster Collective Bargaining Agreements with his Employer at the time of such employment.

(d) Any employment after the date an Employee first became a Participant in this Plan, which meets the following condition shall be considered Covered Employment:

Continuous past employment with an Employer in a classification of work prior to the date such Employer became a contributing Employer to the Pension Fund, if the Employee was employed by such Employer in the same classification of work on the date such Employer became a contributing Employer to the Pension Fund.

(e) Employment by a Union as provided for in this Plan, shall be considered Covered Employment.

(f) Under no circumstances (other than the calculation of Vesting Service Week (as defined in Section 3.04(b)(2)) and solely for the purpose of becoming a Vested Participant) shall any employment by a Participant as a supervisor or in any position excluded from a Bargaining Unit which was or later became subject to a Collective Bargaining Agreement be considered Covered Employment or Credited Service for purposes of this Pension Plan.

(g) Any Participant who is a member of a Bargaining Unit (as defined in Section 1.17) which withdraws from the Pension Fund or otherwise ceases participation in Covered Employment shall lose and be denied all right and claim to any benefit other than whatever benefit which he may be entitled to receive as a result of contributions made or required to be made to the

Pension Fund on his behalf upon his sustaining a One-Year Break in Service (as defined in Section 3.05(c)) after the date of such withdrawal or the cessation of Covered Employment by his Bargaining Unit.

* * *

ARTICLE VII. CONTRIBUTIONS AND FUNDING OF PENSION AND OTHER BENEFITS

Section 7.01: Amount of Contributions. Each Employer shall make continuing and prompt payments to the Trust Fund on behalf of each Employee in its Bargaining Unit as required by the applicable Collective Bargaining Agreement. The obligation to make such contributions shall continue during periods when the Collective Bargaining Agreement is being negotiated, but such contributions shall not be required in the case of a strike after termination of such Collective Bargaining Agreement, unless the parties to such Collective Bargaining Agreement mutually agree otherwise. All Contribution Classes in this Pension Plan are determined by the amount of the weekly contribution paid on behalf of Participants in a Bargaining Unit (as defined in Section 1.17). No contribution will be permitted or accepted on any basis other than full weeks of payments, notwithstanding any Collective Bargaining Agreement to the contrary; any contribution made in an amount not consistent with the Contribution Classes set forth in this Pension Plan shall be considered as if made at the next lower Contribution Class level set forth in this Pension Plan.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Plaintiffs,

Case No. 80-71872
Hon. Anna Diggs Taylor

vs.

CENTRAL TRANSPORT, INC., et al.

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOW COME the above-named Plaintiffs, by and through their attorneys, Russell N. Luplow, P.C., and, pursuant to Rule 65 of the Federal Rules of Civil Procedure, move this Honorable Court for the entry of an Order directing Defendants to show cause, if there by [sic] any, why a preliminary injunction should not issue enjoining Defendants, their officers, agents, servants, employees, attorneys, accountants, and those persons in active concert or participation with them from disposing of, destroying, mutilating, defacing, altering, confusing, or in any way changing the existence, identity, format, or location of all pertinent records, inclusive of those listed below, relating to Defendants' past, present, and future employees; and for the entry of such injunction. Plaintiffs state to the Court as follows:

1. Plaintiffs, multiemployer benefit plans within the meaning of the Employee Retirement Income Security Act of 1974 (29 USC 1001 *et seq.*, hereinafter referred to as "ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (PL 96-364, hereinafter referred to

as the "MEPPAA"), commenced an action against Defendants in May, 1980, on behalf of their Trustees, as well as the participants in and beneficiaries of the Pension and Health and Welfare Plans, in order to collect delinquent contributions owing to the two Funds pursuant to certain collective bargaining agreements, and to compel Defendants to produce pertinent employment-related records for the purposes of an audit as required by Article III, Section 5 of the Trust Agreement governing each Fund.

2. On August 25, 1980, Defendants, various corporations engaged in or supportive of the transportation of goods in interstate commerce, collectively styled as "Central Transport," filed a Motion to Dismiss Plaintiffs' Complaint. Defendants argued that Plaintiffs had neither a contractual nor a statutory right to examine the payroll data of all of their employees without a prior determination by the employer and union that particular employees were "covered" by the collective bargaining agreement. Defendants argued that the confidentiality of the records of "non-covered" employees precluded their disclosure for audit purposes.

3. In order to limit the scope of the audit, Defendants asserted that 60% of their employees were not covered by collective bargaining agreements with the union (various locals affiliated with the International Brotherhood of Teamsters).

4. In September, 1980, Plaintiffs responded to Defendants' Motion to Dismiss and also filed a Motion for Partial Summary Judgment or, in the Alternative, for a Preliminary Injunction to require Defendants to produce pertinent records for all their employees and to submit to the audit as requested by the Fund Trustees.

5. It was and remains Plaintiffs' basic position that the right to determine the scope of an audit and to conduct it lies within the exclusive powers of the Funds' Trustees,

being a matter of ordinary trust administration as contemplated by common law and as codified by ERISA.

6. Plaintiffs have consistently maintained that without such an independent audit, their Trustees would be unable to insure the financial integrity of the funds and to fulfill their fiduciary obligations to the respective Plans' participants and beneficiaries.

7. Article III, Section 5, of each Trust Agreement ("Production of Records") provides: "The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust."

8. Defendants do not deny having been a party to the National Master Freight Agreement ("collective bargaining agreement") for the years relevant to this litigation.

9. Articles 60 and 61 of the collective bargaining agreement incorporate the Trust Agreements by reference. By executing the collective bargaining agreement, a signatory employer ratifies all acts taken or to be taken by the Boards of Trustees.

10. A hearing was held on October 20, 1980, at which the parties agreed to have their respective pleadings treated as Cross-Motions for Summary Judgment, it having been admitted by both sides that no question of material fact existed with respect to the scope of audit issue.

11. The question of law decided by the Court was whether or not the Trustees of the Funds had a contractual and statutory right to demand the production of pertinent employment-related records for all of Central Transport's employees for the purposes of an audit.

12. On October 19, 1981, the District Court issued a Memorandum Opinion and Order in which it found, *inter alia*, that Plaintiffs had a contractual and statutory right to examine the pertinent records of all employees employed by Central Transport regardless of whether Central Transport itself considered them to be covered by the collective bargaining agreement. The Court also determined that Plaintiffs' interest in conducting an independent audit to verify the accuracy of Defendants' reporting outweighed Defendants' interest in protecting the confidentiality of the records of non-unit employees, since a pattern of underreporting had already been established based on a prior and incomplete audit and since Plaintiffs gave specific assurances to protect the confidentiality of the records requested.

13. The District Court ordered Defendants to produce the records requested and to allow Plaintiffs to continue the audit begun earlier.

14. Defendants filed a Motion for Amendment of the Order and for Certification of the issues for appeal pursuant to 28 USC 1292(b). A hearing was held and the District Court denied Defendants' Motion on November 16, 1981, on the grounds that Defendants did not meet the three (3) tests required before a court will certify its orders for an interlocutory appeal.

15. Defendants filed a Notice of Appeal to the Court of Appeals for the Sixth Circuit, characterizing the Orders of the District Court as an "injunction," thus invoking 28 USC 1292(a)(1) of the interlocutory decisions statute.

16. On or about January 18, 1982, Plaintiffs filed with the Court of Appeals a Motion to Dismiss the Appeal, on the grounds that the District Court's Orders were neither a final order nor an interlocutory injunction, and therefore not valid appealable orders either under 28 USC 1291 or 28 USC 1292(a)(1).

17. On January 6, 1982, Plaintiffs' counsel wrote to Defendants' counsel requesting resumption of the audit in compliance with the Court's Orders. Defendant refused to permit resumption of the audit and so advised Plaintiffs' counsel by correspondence of January 8, 1982. The audit has not been commenced. (Exh. A)

18. On or about January 13, 1982, Defendants filed a Motion to Stay Preliminary Injunction pending the Appeal.

19. On or about January 27, 1982, Plaintiffs filed a response. Plaintiffs argued that a stay would be unwarranted since no valid appeal lies and since Plaintiffs' Motion to Dismiss will in call probability be granted. The basis of Plaintiffs' argument was that the District Court did not issue an injunction but ordered, by granting Plaintiffs' Motion for a Partial Summary Judgment, the specific enforcement of express contractual obligations. Plaintiffs argued alternatively that even were the Orders to be construed as an injunction, Defendants did not satisfy the four-prong requirement articulated in Rule 62(c) of the Federal Rules of Civil Procedure, which tests must be passed to justify a District Court in issuing a stay of its own orders pending appeal.

20. Plaintiffs, in their response, demonstrated that they would be irreparably harmed by a stay because of the danger that the records requested would be lost or destroyed during the pendency of the appeal. Plaintiffs incorporate and make part hereof their Brief in Response to Defendants' Motion for a Stay.

21. Plaintiffs have been attempting to conduct a complete audit of Defendant companies since the late winter of 1980.

22. When the audit ceased in March, 1980, only 14 of the 16 named Defendants had been subject to an audit, and then only on the basis of incomplete records. Systematic

underreporting as well as discrepancies as to the identity of "covered" employees were established. (Plaintiffs incorporate herein and make part hereof the Affidavit of Juanito Pasia and John P. O'Sullivan.)

23. Plaintiffs are required by ERISA to award benefits and grant service credit to employees covered by the collective bargaining agreement regardless of whether an employer has contributed on their behalf.

24. Plaintiffs' Trustees, as ERISA fiduciaries, are alone responsible for monitoring an employer's contribution obligations and for taking vigorous action to collect delinquent contributions.

25. Plaintiffs designate as "pertinent records" within the meaning of Article III, Section 5, of the Trust Agreements *(supra)*: payroll ledgers, payroll journals, individual earnings cards, time cards, payroll check registers, cancelled payroll checks and cancelled checks used for payment of income reported on IRS 1099 forms, voucher copies of payroll checks, drivers' daily log and trip sheets, payroll manifests, delivery manifests, trip manifests, terminal drafts, cash disbursements journal, freight bills, revenue bills, billing invoices, fuel and mileage reports, drivers' settlement statements, seniority lists, dues check-off lists, IRS Forms 941 and 941C, IRS Forms W-2, W-3 and W-4, IRS Forms 1099, employer's monthly and quarterly state unemployment compensation tax and wage reports, annual reports to the Interstate Commerce Commission, Department of Labor statistical log and summary of occupational injuries and illness, personnel, files, attendance records, accounting records for distribution of payroll costs, payroll account reconciliations, workman's compensation records, notices of employee separation, monthly reports to any employee benefit plan, computer files including magnetic data base and printed reports containing above information, and corporate tax returns.

26. On December 15, 1981, Plaintiffs attempted to obtain a stipulation from Defendants for the entry of an Order, and for a preliminary injunction restraining Defendants (and/or its officers, agents, employees, attorneys et al) from destroying or defacing the above-itemized records pending final resolution of the issue of Plaintiffs' right to conduct a complete audit. (Exh. B)

27. Defendants have refused to stipulate to the entry of such an Order and have not otherwise guaranteed the later availability of these records. (Exh. C)

28. Without these records, it will be difficult for Plaintiffs to verify the accuracy of Defendants' reporting and to determine whether delinquencies exist. Nevertheless, Plaintiffs will be liable to any employee who can prove that he performed bargaining unit work for the requisite period of time pursuant to a collective bargaining agreement executed by Defendants. This situation would undermine Plaintiffs' actuarial solvency and cause irreparable harm.

29. A preliminary injunction restraining Defendants and their agents from taking any action to threaten the later availability of the above-itemized records is necessary to preserve and maintain the status quo (eg. the present form and location of these records) until such time as the issue of Plaintiffs' right to conduct a complete audit is decided in favor of Plaintiffs and, in that event, until such time as the audit is conducted and completed.

30. This Motion is based upon the pleadings heretofore filed with this Court, including all Briefs in support of and in response to earlier Motions, together with all attached Affidavits, Plaintiffs' Motion to Dismiss the Appeal and supporting Brief, correspondence attached hereto as Exhibits A through C, and Plaintiffs' Brief in Support of this Motion.

WHEREFORE, Plaintiffs, Central States, Southeast and Southwest Areas Pension and Health & Welfare Funds, request this Honorable Court to enter an Order for a preliminary injunction enjoining Defendants, their officers, agents, servants, employees, attorneys, accountants, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, from disposing of, destroying, mutilating, defacing, altering, confusing, or in any way changing the existence, identity, format, or location of the pertinent records, itemized above, relating to the past, present, and future employees of Central Transport, pending final resolution by this Court or the Court of Appeals of Plaintiffs' right to conduct a complete audit and, if such issue be decided in favor of Plaintiffs, pending the conduct and completion of such audit.

LAW OFFICES OF RUSSELL N. LUPLOW, P.C.
Attorneys for Plaintiffs
505 Woodward, Suite 3400
Bloomfield Hills, MI 48013
644-8666

(s) Russell N. Luplow
(s) Diana L.S. Peters

Of Counsel:
(s) Charles J. Taunt

Dated: January 26, 1982

APPENDIX C

NATIONAL MASTER FREIGHT AGREEMENT

Covering

OVER-THE-ROAD

and

LOCAL CARTAGE

EMPLOYEES OF PRIVATE,

COMMON, CONTRACT AND

LOCAL CARTAGE CARRIERS

For the Period of

MARCH 1, 1982

through

MARCH 31, 1985

* * *

Section 3.

Check-Off

The Employer agrees to deduct from the pay of all employees covered by this Agreement the dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions prior to the end of the month for which the deduction is made. Where laws require written authorization by the employee, the same is to be furnished in the form required. The Local Union shall certify to the Employer in writing each month a list of its members working for the Employer who have furnished to the Employer the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted for such month from the pay of such member, and the Employer shall deduct such amount from the first paycheck following receipt of statement of certification of the member and remit to the Local Union in one lump sum. The Employer shall add to the list submitted by the Local Union the names of all regular new employees hired since the last list was submitted and delete the names of employees who are no longer employed. Check-off shall be on a monthly or quarterly basis at the option of the Union.

When an Employer actually makes a deduction for dues, initiation fees and assessments, in accordance with the statement received from an appropriate Local Union, he shall remit same no later than thirty (30) days from the date such deduction was made and in the event he fails to do so, he shall be assessed ten percent (10%) liquidated damages.

Where an employee who is on check-off is not on the payroll during the week in which the deduction is to be made, or has no earnings or insufficient earnings during that week, or is on leave of absence, the employee must make arrangements with the Local Union and/or the Employer to pay such dues in advance.

The Employer will recognize authorization for deductions from wages, if in compliance with state law, to be transmitted to the Local Union or to such other organizations as the Union may request if mutually agreed to, except DRIVE deductions which shall be made annually. No such authorization shall be recognized if in violation of state or federal law. No deduction shall be made which is prohibited by applicable law.

In the event that an Employer has been determined to be in violation of this Article by the decision of an appropriate grievance committee, and if such Employer subsequently is in violation thereof after receipt of seventy-two (72) hours written notice of specific delinquencies, the Local Union may strike to enforce this Article. However, such strike shall be terminated upon the delivery thereof. Errors or inadvertent omissions relating to individual employees shall not constitute a violation.

* * *

ARTICLE 61.

HEALTH AND WELFARE BENEFITS

Effective March 1, 1982, the Employer shall contribute to a fund, which is to be administered jointly by the parties, the sum of $39.50 per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more and effective April 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND

SOUTHWEST AREAS HEALTH AND WELFARE FUND or other applicable fund the sum of $45.50 per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. There shall be no other increase in the Employer contribution during the term of this Agreement except those amounts which are allocated by the Joint National Master Committee from the cost-of-living adjustment provided by Article 33. Such allocation shall be uniform in amount, and to the extent possible, in the sole discretion of the Joint National Master Committee, such uniform amount shall provide for the maintenance of Health and Welfare benefits in effect on January 1, 1982. If the allocation of the entire amount of the cost-of-living adjustment provided by Article 33 is less than the uniform amount so determined, the Employer contribution will be increased to the uniform amount determined by the Joint National Master Committee.

The Joint National Master Committee shall determine the form and nature of the information to be submitted by the respective Health and Welfare Funds, which information shall be submitted to the Joint National Master Committee 90 days prior to April 1, 1983 and April 1, 1984 and March 31, 1985.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks.

If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an em-

ployee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union or the Trustees. In the event of such referral, the Employer shall not be deemed to be delinquent, while the matter is being considered, but if the Conference Joint Area Committee, by majority vote, determines that contributions are required, the Employer shall pay to the Trust Fund the amounts due together with any other charges uniformly applicable to past due contributions. The Conference Joint Area Committee may also determine whether the Employer's claim was bona fide.

Contributions to the Health and Welfare Fund must be made for each week on each regular employee, even though such employee may work only part-time under the provisions of this Agreement, including weeks where work is performed for the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other Health and Welfare fund.

Contributions shall be made for any regular employee on layoff who is worked one (1) day in any week for any reason.

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week. In addition, any active employee on the

seniority list and available for work, the Employer shall pay the full weekly contributions for that work week.

Employers presently making payments to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, and Employers who may subsequently begin to make payments to such fund, shall continue to make such payments for the life of this Agreement. Action on delinquent contributions may be instituted by either the Local Union, the Area Conference, or the Trustees. Employers who are delinquent must also pay all attorneys' fees and costs of collection.

ARTICLE 62.

PENSIONS

Effective March 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND the sum of Fifty-One dollars ($51.00) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more. Effective April 1, 1982, the weekly contributions shall be increased to Fifty-Five dollars ($55.00).

This fund shall be the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. There shall be no other pension fund under this Agreement for operations under this Agreement or for operations under the Southern Conference Area Agreements to which Employers who are party to this Agreement are also parties.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all

notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months.

If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union or the Trustees. In the event of such referral, the Employer shall not be deemed to be delinquent, while the matter is being considered, but if the Conference Joint Area Committee, by majority vote, determines that contributions are required, the Employer shall pay to the Trust Fund the amounts due together with any other charges uniformly applicable to past due contributions. The Conference Joint Area Committee may also determine whether the Employer's claim was bona fide.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-operator compensation.

Contributions to the Pension Fund must be made for each week on each regular employee, even though such employee may work only part-time under the provisions of this Agreement, including weeks where work is performed for

the Employer but not under the provisions of this Agreement, and although contributions may be made for those weeks into some other pension fund. Contributions shall be made for any regular Employee on layoff who is worked one (1) day in any week for any reason.

If any employee on the seniority list is worked a day in any work week either as a replacement or supplemental employee, the Employer shall pay the full weekly contribution for that work week. In addition, any active employee on the seniority list and available for work, the Employer shall pay the full weekly contributions for that work week.

Effective March 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST, AND SOUTHWEST AREAS PENSION FUND the sum of eight dollars ($8.00) for each tour of duty worked by each casual and/or probationary employee, until such time as such employee accrues seniority in accordance with the contract.

Effective April 1, 1982, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND the sum of $8.00 for each tour of duty worked by each casual employee until such time as such employee accrues seniority in accordance with the contract. This shall not apply to a bona fide probationary employee who is notified in writing, with a copy to the Local Union, at the beginning of his employment that he is a probationary employee. However, if such probationary employee does not accomplish seniority under the provisions of the contract, but is terminated during the probationary period, the Employer must give written notice of such termination to the Local Union and he must then comply with the contract provisions for pension payments for each day of employment as if he were an extra employee. Any violation of this provision shall be subject to the grievance procedure.

Action for delinquent contributions may be instituted by either the Local Union, the Area Conference or the Trustees. Employers who are delinquent must also pay all attorneys' fees and costs of collection.

* * *

APPENDIX D

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

Appendix D
(Emphasis Added)

EXHIBIT F

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

The Trustees
Central States, Southeast and
Southwest Areas Pension Fund

We have examined the accompanying statement of net assets available for benefits of Central States, Southeast and Southwest Areas Pension Fund ("Fund") at December 31, 1982 and 1981, and the related statement of changes in net assets available for benefits for the years then ended. *Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.* Securities owned by the Fund at December 31, 1982 and 1981 were confirmed to us by the custodians.

In our opinion, the statements mentioned above present fairly the net assets available for benefits of the Fund at December 31, 1982 and 1981, and the changes in net assets available for benefits for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis during the period.

Our examinations were made for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplementary information appearing in Exhibits G through Q and in Items 13 and 14 of the accompanying Form 5500 is presented for purposes of additional analysis and is not a required part of the basic financial statements. This information has been subjected to the auditing procedures applied in the examination of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

(s) ARTHUR YOUNG & COMPANY

Chicago, Illinois
March 30, 1983

APPENDIX E

[Letterhead of Central States Southeast and Southwest Areas Health and Welfare and Pension Funds]

April 5, 1984

Robert S. Brown, Esq.
Brown, Cummins & Brown Co., LPA
Six East Fourth Street
Cincinnati, Ohio 45202

RE: THE VICTOR TRANSIT CO.

Dear Mr. Brown:

I am writing as a follow-up to our conversation April 4, 1984 and your letter of March 21, 1984. As stated in our engagement letter sent to Mr. William Dally of Victor Transit Corp., the proposed audit will cover the period December 28, 1980 through December 21, 1983. This is the standard scope of audits performed by the Funds. It should be pointed out though that if there is evidence of significant overreporting or underreporting documented during the audit, the audit scope is expanded to cover all periods not barred by the Statute of Limitations.

Attached for your information are excerpts from the Board of Trustees agenda which includes the recommendation for the audit department. Also attached for your information is an excerpt from the 1982 Institute on Collection of Employer Contributions which discusses the Funds' Fiduciary responsibility to perform audits.

I hope this information satisfies your requests. Someone from my department will be contacting you in the near future to determine the schedule for an audit.

If you have any questions, please do not hesitate to call me at 800-323-2152, extension 443.

Very truly yours,

(s) Albert E. Nelson
Director
Field Audit Group

AEN:aw

cc: Robert M. Warner, Finance Director

Appendix E

THE PAYROLL AUDIT PROGRAM

by Michael J. Carroll and Harvey Frank, CPA

THE FIDUCIARY DUTY TO AUDIT

Let us begin with the statement of a very obvious principle: Trustees have a fiduciary obligation to take every reasonable step possible to collect all contributions due the trust.

In theory it may be possible to perform this legal duty without an auditing program. If you represent a very small trust with highly specialized participants, or if the geographical area is small enough that all employer activity takes place under your watchful gaze, audits might not be crucial to your collection program.

Virtually all multiemployer plans involve too many potential participants, too many employers and too large an area for trustees to personally check every timecard. There is no way to collect all contributions due the trust without an audit program. There is no way to even guess what your unfunded liability is without an audit program.

Mr. Carroll is a member attorney with the San Francisco law firm, Erskine & Tulley, a professional corporation, and during the past eight years he has specialized in the collection of delinquent employer contributions for the trucking, construction and printing industries, among many others. He earned his B.A. and J.D. degrees at the University of San Francisco. Mr. Carroll has spoken before other professional organizations, including previous Foundation educational meetings.

[PHOTO]

Mr. Frank is partner-in-charge of multiemployer trust fund audits for the Detroit office of Fox & Company. A member of the American Institute of Certified Public Accountants, he served on the Behavioral Standards Subcommittee of the Ethics Committee. Additionally, he was chairman of the Ethics Committee of the Michigan Association of CPAs. Mr. Frank received A.B. and M.B.A. degrees from the University of Michigan at Ann Arbor and is a member of the International Foundation's Accountants Committee. He has participated in previous Foundation educational programs.

[PHOTO]

Appendix E

The role of the audit in fulfilling the trustee's legal duty to collect all contributions is highlighted by the court in *Central States Pension Fund v. Central Transport*, 522 F. Supp. 658, 2 EBC 1844 (D.C.Mich. 1981). Central Transport argued that it had no statutory or contractual duty to open its books to the trust. Also, the company argued that it had an obligation to protect the confidentiality of its employee records.

The court granted partial summary judgment for the trust, acknowledging that without an independent audit the trust is unable to fulfill its fiduciary obligations to the participants in, and beneficiaries of, the benefit plans. The court did find that a contract obligation to allow the audit existed. But, in addition to the contract basis, the court emphasized that a separate, statutory ground for the audit could be found in ERISA. ERISA imposes on trustees the obligation to discharge their duties with the care, skill, prudence and diligence of a prudent man. Since the trustees, in carrying out their duties to preserve and maintain the assets, believed that an audit was necessary, the court found that ERISA mandated that Central Transport must open its books to examination.

A critical analysis of the court's reasoning, in my view, makes ERISA's mandate a two way street. Not only must Central Transport allow an audit, but the Central States trustees must have an auditing program.

In this case the auditors were allowed in, but Central Transport only provided the records of employees the company believed were covered by the contract. The company contended that 60% of its people did uncovered work. The auditors asked for all employee records. Before they were kicked out, the auditors had seen enough to conclude that at the very least Central Transport had underreported by $172,303.50.

How many employers contributing to your trust believe erroneously that 60% of their people do uncovered work?

How many employers in your trust owe an additional $172,303.50 in contributions? You will not know until you audit. But if you never audit, you will never know.

Trustees must keep in mind that the Labor Department-IRS exemption from the prohibited transaction section says:

> Plans which do not establish and implement collection procedures which are reasonable, diligent and systematic may be engaging in prohibited transactions in failing to collect delinquent contributions.
>
> Prohibited Transaction Exemption
> 76-1, 41 *Fed. Reg.* 12741
> (March 26, 1976)

A Collection procedure that fails to include an auditing program is not reasonable, diligent or prudent. This is not to say that you must set aside substantial trust assets for an auditing program to perform your fiduciary duties. Audit fees and other costs should be borne by the employer whenever the audit shows he has failed in some substantial way to pay voluntarily all he owes.

THE LEGAL BASIS FOR THE AUDIT

Trust funds have a common-law right to an accounting by employers of the contributions due and owing to the trust. ERISA Section 209(a) requires every employer to maintain records sufficient to determine the benefits due or those that may become due to its employees. These common-law and statutory obligations are not sufficient to afford an auditor unfettered access to all the records he may require.

The collective bargaining agreement or the trust agreement should create the right to audit and set forth the employer duty to produce all necessary books and records on demand. There are pros and cons to the use of each document for this purpose. When the obligation is in the collective bargaining agreement, the employer is put on

notice from the outset that he might someday be audited. This notice may act as a deterrent. On the other hand, the bargaining parties may not want to make this provision, especially if it is long. Or worse, they might want to change the wording or bargain over the clause, which is not appropriate in most cases. The trustees, wearing their hats as trustees, as opposed to labor and management, should have a clause that fills their needs as fiduciaries. The trust document is the appropriate place for audit language, especially if the trustees go to some pains to remind employers of the audit provisions through other devices.

In the Appendix are four sample provisions that provide for the right to audit. Each has evolved to meet the needs of trust funds in different industries. Some industries, by their very nature, are more difficult to audit and greater specificity in the audit language is required to ensure an accurate result. Compare each of these clauses to your trust agreement or collective bargaining contract and incorporate any new language that solves problems encountered by your trust.

Sometimes, even with language that appears adequate on the surface, a trust will have difficulty getting a complete audit. In *Central States Pension Fund v. CRST, Inc.*, 641 F.2d 616, 104 LRRM 3096, 2 EBC 1151 (8th Cir. 1981), the auditor wanted access to the employment and earnings records of all CRST employees, including employees who may not be covered by the collective bargaining agreement. The language was very similar to Example Two in the Appendix.

The court defined the word "employee" as "covered employee" in a very narrow reading of the trust agreement. It even took the phrase "and such other information as the Trustees may reasonably require" and by interpretation added the phrase "about covered employees." The court suggested, as an alternative, vigilance by the union, including review of seniority lists and billing statements and use of the grievance procedure when it believes "covered employees" is being too narrowly construed by the

employer. If the trustees, as opposed to the union, think that the employer isn't paying on all covered employees, a footnote suggests that the Secretary of Labor has the power to investigate and to reveal the results of the investigation to the trust fund.

The CRST decision shows a complete lack of understanding by that court of the crucial role audits play in ensuring employer compliance with its bargained-for obligations. The lesson is to leave no doubt whatsoever about the desired scope of the audit.

* * *

APPENDIX F

(Emphasis in Original)

[Letterhead of New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

June 3, 1983

Mr. Beryl Schroyer
Quad State Leasing
P.O. Box 80
Warren, Michigan 48090

RE: Employee Payroll Audit

Dear Mr. Schroyer:

Please be reminded, The Employee Retirement Income Security Act, specifically provides that the employer *must provide* the necessary information for the performance of our fiduciary duties. The cases uniformly ho'd that part of the Fund's fiduciary obligation is to audit contributing employers to determine whether the Fund's are receiving all the monies due the Funds.

It is impossible to determine if the Funds have been paid proper contributions if the employer only provides to the Fund Auditor, records of those employees the employer has contributed for.

In other words, an employer who is "cheating" can show the Fund Auditor the employees contributed on and withhold from the Auditor the employees the employer should have contributed on but did not, make the Fund's audit procedures totally ineffective.

For the Fund Auditor to determine whether or not the Funds have received the proper contributions, we require the complete payroll records of Quad State Leasing, anything less is not acceptable.

Appendix F

Should Quad State Leasing not immediatley comply fully with the ERISA requirements, the Funds shall be forced to conclude Quad State Leasing is refusing to be audited and Quad State Leasing's participation in the Funds shall be cancelled, making Quad State Leasing liable for its employees Medical Claims, Death Benefits and Pension Benefits.

We urge you do not allow this to happen.

Sincerely,

(s)Al Sgaglione
Executive Administrator

AS/11
C.R.R.R. #P30 2699344
cc: Ervin Walker, President, Local Union No. 449
Cindy Walters
Helen Clifford, Supervisor, Audit Department
Stephen Yagey, Fund Auditor

Appendix F

[Letterhead of New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

June 27, 1983

Mr. Beryl Schroyer
Quad State Leasing
P.O. Box 80
Warren, Michigan 48090

RE: Audit Refusal - Participation Cancellation

Dear Mr. Schroyer:

Since Quad State Leasing, has ignored the Funds letter to your office of June 3, 1983, be advised, effective 12:01 A.M., Friday, July 1, 1983, Quad State Leasing has provoked the cancellation of its participation in the Funds.

Quad State Leasing is in violation of ERISA and the Fund Participation Agreement, specifically, Provisions One, Four and Thirteen.

The employees of Quad State Leasing and Teamsters Local Union No. 449, by copy of this letter are being informed, that Quad State Leasing has refused to make available its employee payroll records for examination by the Funds, in accordance with ERISA requirements and the Fund Participation Agreement requirements, resulting in the cancellation of Fund participation, effective 12:01 A.M., Friday, July 1, 1983. Participation cancellation makes Quad State Leasing liable for its employees Medical Claims, Death Benefits, Pension Benefits, Lump Sum Death Benefits and Legal representation.

This matter shall be referred to the Fund Attorneys for appropriate legal proceedings.

Appendix F

Quad State Leasing can only be considered for reinstatement as a participating employer, whenever the Fund Auditor is furnished the required employer payroll records and the Auditor concludes the examination of Quad State Leasing payroll records for the period June 1978 thru present.

No further contributions can be accepted by the Funds.

It is most unfortunate that Quad State Leasing has caused this interruption of benefit coverage for its employees.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/11
C.R.R.R. #P30 2699345
cc: Rocco F. De Perno, Trustee and Chairman
Fund Policy Committee
Ervin Walker, President, Local Union No. 449
Quad State Leasing — Employees
Cindy Walters, Quad State Leasing
Rocco A. De Perno, ESQ., Fund Attorney
Josephine Russo, Assistant Administratrix
Josephine Dontino, Assistant Administratrix
Joseph Marraffa, Director, Data Processing Department
Adele Novak, Senior Supervisor, Bookkeeping Department
Helen Clifford, Supervisor, Audit Department
Pam Wehby, Supervisor, Legal Benefit Fund
Stephen Yagey, Fund Auditor

Appendix F

[Letterhead of Simpson, Moran & Burnett]

July 11, 1983

Mr. Al Sgaglione
Executive Administrator
New York State Teamsters Council Health
& Hospital Fund and
New York State Teamsters Conference Pension
& Retirement Fund
7 Rutger Park
Utica, New York 13501-3096

RE: Quad States Leasing
Participation Cancellation
Our File No. 3488

Dear Mr. Sgaglione:

Quad State Leasing has fully complied with ERISA requirements and the Participation Agreement concerning record disclosure to the Fund. Quad State Leasing has provided the auditors with all records necessary for the Fund to fulfill its fiduciary obligations.

Your June 3, 1983 statement concerning case authority is clearly inaccurate. The cases have not held that the trustees of a benefit fund are entitled to audit records of noncovered employees. In this regard, I cite to you the case of *Central States et al. v. Central Transport, Inc., Quad State Leasing, et al.*, 698 F.2d 802 (6th Cir. 1983).

Your unilateral action, terminating benefits for our employees, is in direct violation of your own fiduciary responsibilities to those employees. If you sincerely felt you were entitled to audit such records, your proper recourse would have been to initiate suit to compel discovery, rather than take action which harms the very people you proclaim to protect. Quad State Leasing has complied in all regards with your audit, but for the unreasonable request to audit records of noncovered employees. Nothing in the Participa-

tion Agreement permits the action you have taken. The Agreement states that the Fund may audit covered employees and in any event nothing therein gives the Fund the right to terminate benefits for failure to permit examination of non-covered employees.

Thus, unless you immediately reinstate, retroactively, benefit coverage for Quad State Leasing's employees, we will initiate suit against the Funds for their wrongful termination of benefit coverage, breach of the Participation Agreement and breach of their fiduciary duties.

Very truly yours,

SIMPSON, MORAN & BURNETT
Patrick A. Moran
and
Vivian B. Perry

VBP5I/cmb

cc: Fred Murad, Esq.
Rocco F. DePerno
Ervin Walker
B. L. Shroyer

Appendix F

[Letterhead of New York State Teamsters Conference Pension & Retirement Fund]

July 12, 1983

Mr. Beryl Schroyer
Quad State Leasing
P.O. Box 80
Warren, Michigan 48090

Dear Mr. Schroyer:

According to our records, your company has ceased making contributions to this Pension Fund in May 1983 on behalf of your employees covered by the Collective Bargaining Agreement and the Standard Fund Participation Agreement.

Therefore, under the Multi Employer Pension Plan Amendments Act of 1980, there may be an Employer Withdrawal Liability.

We are in the process of determining your company's Employer Withdrawal Liability.

As soon as these calculations are completed by the Fund, we will notify you of the monies your company owes this Pension Fund, if any.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/lm
cc: Trustees DePerno, Mousseau, Bush, Canzoneri, Nolan, Gundersen and Muller
Teamsters Local Union No. 449
Josephine Dontino, Assistant Administratrix
Sol Tabor, Fund Consultant

Appendix F

[Letterhead of New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

July 15, 1983

Quad States
P.O. Box 80
Warren, Mi. 48090

Dear Sir:

We are returning your June 1983 Employer Report Form, company check No. 37874 in the amount of $458.38 for Health and Hospital Fund and company check No. 37875 in the amount of $1,125.19 for Pension and Retirement Fund.

Since your company has not complied with the rules of the Fund by refusing to allow the Fund to check the payroll records of your company, we cannot accept any further contributions until such time as your company agrees to abide by the rules of the Fund.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/ll
Encl.
cc: Local No. 449

Appendix F

[Letterhead of New York State Teamsters Conference Pension & Retirement Fund]

July 28, 1983

Mr. Sol Tabor
Fund Consultant
Tolley International Corporation
60 East 42nd Street
Room 721
New York, New York 10165

RE: Quad State Leasing
Local Union No. 449
Employer Withdrawal Liability

Dear Mr. Tabor:

This is to advise that Quad State Leasing, ceased contributing to the Fund.

The last contributions received by the Fund, are attached.

Please prepare the Employer Withdrawal Liability, if any.

Thank you.

Sincerely,

Al Sgaglione
Executive Administrator

AS/lm
encl.
cc: Trustees DePerno, Mousseau, Bush, Canzoneri, Nolan, Gundersen and Muller
Josephine Dontino, Assistant Administratrix
Teamsters Local Union No. 449
Beryl Schroyer, Quad State Leasing

Appendix F

Quad State Leasing Local 449 Eff. 6/78

	N.Y. State	Upstate	Total
1978	$ 9,606.55		$ 9,606.55
1979	$13,310.15	$3,016.15	$16,326.30
1980	$ 9,592.29	$4,920.11	$14,512.40
1981	$ 9,803.96	$7,561.11	$17,365.07
1982	$ 4,961.57	$5,157.90	$10,119.47
1983	$ 2,533.21	$3,318.15	$ 5,851.36

Last Cont 5/83

6/29/83 PT

Appendix F

[Letterhead of New York State Teamsters Conference Pension & Retirement Fund]

December 16, 1983

Mr. Andrew Maloney, Esq.
Maloney, Viviani, Higgins
and Kelly
630 Fifth Avenue
New York, New York 10020

RE: Quad State Leasing
Employer Withdrawal Liability

Dear Mr. Maloney:

In accordance with the provisions of the Multiemployer Pension Plan Amendments Act of 1980, the actuary for the Fund has calculated the Employer Withdrawal Liability (EWL) for the above named company and determined the Employer Withdrawal Liability to be, $18,019.00.

Also, pursuant to the payment schedule adopted by the Board of Trustees, the above named company was notified by the Fund that it was required to submit a monthly payment in the amount of $915.99, with the first payment due the Fund within sixty (60) days from the date of the letter to the company, informing the company of this payment.

More than sixty (60) days has elapsed since notification by the Fund to the company, without the required remittance from the company.

Your office is authorized to institute the appropriate legal proceedings against the above named company, to immediately compel payment to the Fund of the company Employer Withdrawal Liability, plus interest.

The rules adopted by the Board of Trustees provide that the Fund can request payment in full of the Employer

Withdrawal Liability whenever, an employer does not abide by the payment schedule, the Fund in this case, did inform the company of the rules.

We are enclosing a copy of the letter sent to the above named company, notifying the company of the total Employer Withdrawal Liability and the monthly schedule of payment requirement.

If you require any additional information in this regard, please do not hesitate to contact me.

Sincerely,

Al Sgaglione
Executive Administrator

AS/ll
Encl.
cc: Trustees De Perno, Mousseau, Bush, Canzoneri, Nolan, Gundersen and Muller
Rocco A. De Perno, Esq., Fund Attorney
Peter P. Paravati, Sr., Esq., Fund Attorney
Sol Tabor, Fund Actuarial Consultant
Harold Silverberg, Fund Accountant
Josephine Dontino, Assistant Administratrix
Teamsters Local Union No. 449
Quad State Leasing

Appendix F
(Emphasis in Original)

[New York State Teamsters Council
Health & Hospital Fund

New York State Teamsters Conference
Pension & Retirement Fund]

January 24, 1984

Mr. Charles Garvaglia
Central Cartage Company, Inc.
34200 Mound Road
Sterling Heights, Michigan 48077

RE: Payroll Examination

Dear Mr. Garvaglia:

The Fund Audit Department has been attempting to arrange a date for an examination of the employer payroll records for Central Cartage Company, Inc., covering the period of July 1981 thru present, with no success.

Telephone calls were made to (313) 939-7000 on the following dates;

December 8, 1983 — 1:30 P.M., Chris took the call and said Mr. Garvaglia would return the call.

December 12, 1983 — 1:45 P.M., informed Mr. Garvaglia was not in but you would return the call.

January 4, 1984 — 10:00 A.M., informed Mr. Garvaglia was not in and no one else can accept the message.

January 9, 1984 — 2:30 P.M., informed Mr. Garvaglia was not in.

If we did not know better, one could get the impression, Mr. Charles Garvaglia was avoiding the scheduling of the required employer payroll examination.

Appendix F

This is the final attempt to obtain your cooperation, should your office fail to communicate in writing, within (14) days of receipt of this letter, a date within the next (30) days for a Fund Payroll Auditor to conduct an examination of the employer payroll records for Central Cartage Company, Inc., your company shall be declared delinquent for what will be termed, an "audit refusal."

The Board of Trustees directs, an employer or company to be audited, must show the auditor or accounting firm conducting such audit, any and all records, books, time sheets, log sheets and other papers or documents deemed necessary by the auditor for a complete and just audit.

Copy of the Employee Retirement Income Security Act (ERISA), Section 1059, Recordkeeping and reporting requirements are enclosed for your information.

Also enclosed, is copy of a decision by the United States Court of Appeals whereby an employer falsified plan-related documents were guilty of a violation of the Federal Criminal Code.

The "Agreement" explicitly states;

"contributions shall be made as set forth herein, on all employees doing bargaining unit work and on any and all other employees doing the same work as bargaining unit employees, whether or not they are included in the bargaining unit, whether or not they are union members, whether full time, part time, casual or seasonal." It can only be determined whether or not Central Cartage Company, Inc. contributed properly on any person performing bargaining unit work, by making available the employer payroll records.

Appendix F

Mr. Charles Garvaglia
January 24, 1984
Page Three

Your company is required to make available to the Fund Payroll Auditor the following:

1). Employer payroll records, pursuant to the Employee Retirement Income Security Act (ERISA), *this includes both bargaining unit and non-bargaining unit employees*. The information to be obtained from the employer payroll records is the names of the employees, hours and/or days paid each week, (examples: year-to-date, monthly or weekly employee earnings records, payroll registers or journals, hourly verification records or time cards).

2). Employer Monthly Pension and Retirement/Health and Hospital Reports.

3). New York State quarterly tax reports - Form WRS-2.

4). Contract(s) and/or Agreement(s) between Employer and participating Local Union(s) for the period July 1981 through the present.

5). Workers Compensation Logs/Reports (yearly O.S.H.A. logs summarizing illnesses and injuries, C-2, C-11, etc. forms) and Company Disability Reports.

In order to facilitate this audit, please have the aforementioned records and information available at the time of the scheduled appointment.

Should these Funds be provoked to cancel participation by Central Cartage Company, Inc., the payment of all claims become the liability of Central Cartage Company, Inc., including but not all inclusive, Health and Hospital Fund Medical Claims, Health and Hospital Fund Death Benefits, Pension and Retirement Fund Pension Benefits, Pension and Retirement Fund Lump Sum Death Benefits, etc..

Appendix F

In addition Central Cartage Company, Inc. shall be required to satisfy the Multiemployer Pension Plan Amendments Act of 1980, the Employer Withdrawal Liability provision.

In the event this office does not hear from your office within the time limit outlined herein, the Funds will act accordingly without any further notice.

Sincerely,

(s) Al Sgaglione
Executive Administrator

AS/maf
Enclosures
C.R.R.R. #P30 2699086
cc: Rocco F. De Perno - Trustee and Chairman
Fund Policy Committee
Ernest Moyer, President, Local Union No. 118
Everett L. Campbell, Secretary-Treasurer, Local Union No. 317
Charles Piscitello, Secretary-Treasurer, Local Union No. 375
Josephine Russo, Assistant Administratrix
Josephine Dontino, Assistant Administratrix
Joseph Marraffa, Director, Data Processing Department
Adele Novak, Senior Supervisor, Bookkeeping Department
Helen Clifford, Supervisor, Audit Department

Office - Supreme Court, U.S.
FILED
NOV 16 1984
ALEXANDER L. STEVAS
CLERK

8257

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

Russell N. Luplow*
Diana L.S. Peters
505 Woodward Avenue
Bloomfield Hills, MI 48013
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Attorneys for Petitioners
** Counsel of Record*

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40 pp

QUESTION PRESENTED

In implementing a field audit program in accordance with the "prudent man" rule of ERISA, may the trustees of multiemployer employee benefit funds, without being arbitrary or capricious, request access to payroll, tax, and other "pertinent records" relating to the wages, hours and duties of *all* employees of contributing employers:

1) Where the purpose of the audit is to monitor a self-reporting system and to assure compliance with statutory and contractual obligations;

2) Where the funds must award service credits and benefits to employees on the basis of work performed under a collective bargaining agreement even in the absence of employer contributions;

3) Where records relating to an employer's complete work force are necessary to comply with generally accepted auditing standards;

4) Where substantial safeguards are offered to protect the confidentiality of employee records;

5) Where the trust agreements governing the funds, as construed by the trustees, authorize such audits;

6) Where, absent such audits, the trustees must rely on the discretionary efforts of unions, employees, or the Secretary of Labor to oversee employer contributions and hence to protect the actuarial solvency of the funds.

OR

May employers withhold the records of all employees except those they *concede* are covered by the collective bargaining agreement *unless* the trustees first establish reasonable cause to believe that other individuals perform bargaining unit work and should be reported regardless of how the employer has classified them?

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STATEMENT OF THE CASE

His reasons are as two grains of wheat hid in two bushels of chaff. You shall seek all day ere you find them, and, when you have them, they are not worth the search. (Shakespeare, *The Merchant of Venice*, Act I, Scene 1)

Introduction

Having analyzed Transport's "facts" and "arguments," Central States scarcely recognizes the case as the same one that wound its way through the lower courts to find itself before this Tribunal some 18 Briefs and four years after the original Complaint was filed. To begin with, the "Question Presented" distorts the issue and leads the Court off to a false start. In support of its position that Central States does not have a contractual or statutory right to conduct random general audits to verify the accuracy of employer reporting and to uncover undisclosed (as opposed to merely "suspected" participants), Transport asks: "Whether a multiemployer employee benefit fund maintained for Union workers can force a contributing employer to disclose confidential records concerning employees the Union has determined are not performing Union work . . ."

First, Central States is not "maintained for Union workers" only. The National Master Freight Agreement ("NMFA"), the very contract signed by Transport, contains a broad union security clause authorizing a union shop, an agency shop, or any shop permitted or required by state law (App. A, p. 2-7). Central States' jurisdiction includes "right to work" states such as Iowa. The Sixth Circuit itself stated that "union membership is not a prerequisite to coverage so that both union and nonunion employees are covered if their job classification is . . . described" in "the NMFA and/or supplements" (App. B P.C., p. 16). Central States Pension Plan (cited by Transport, R.B., pp. 5a-15a) expressly prohibits exclusion because of lack of union membership. Section 3.01(e) of the Plan states: "Neither membership nor lack of membership in any labor organization shall be a basis for participation in, or eligibility to receive benefits from, the Pension Plan."

Second, no Union was involved in this suit at *any* stage of the proceedings, either at the local, area, or international level. On this point, the Court is referred to the entire district court and appellate record. Hence, there was *no prior determination by the Union and the employer* to

substantiate Transport's allegation that 60% of its employees were *not performing Union work*. By framing the "Question" in this fashion, Transport is clearly laying a foundation for its later proposition that Central States' audits are designed to undermine, "abrogate," and unilaterally "modify" valid agreements between employers and unions, to expand the bargaining unit, and to raid participants from other funds. Aristotle, however, observed long ago that "we ought in fairness to fight our case with no help beyond the bare facts" (*Rhetoric*, III, 1403d-1405a). The purpose of this Reply is to recall the facts, to recapitulate the issues, and to place Transport's "parade of horribles" in proper perspective.

The purpose of audits; the audit of Transport

Central States, like most Taft-Hartley multiemployer plans of any appreciable size, *must* operate on a self-reporting system; hence the Trustees *must* rely on contributing employers to report correctly, as the district court noted (App. A P.C., p. 6). Nevertheless, misreporting occurs, both as a result of clerical errors and mistakes of fact or law or through intentional omissions. To encourage correct reporting and to deter evasions, Central States has established a field audit program and conducts random inspections of contributing employers' records under the authority of ERISA's "prudent man" rule (29 U.S.C. § 1104) as well as Art. III, Sec. 5 and Art. IV, Sec. 14(e) of the Fund Trust Agreements (App. F P.C., pp. 46, 47).

While Central States *requests access* for (GAAS) testing purposes to a variety of records, very few classes of records are actually inspected unless discrepancies or disputes occur or unless the employer does not *maintain* the basic tie-in documents.[1] However, a prudent auditor must initially satisfy himself that all employees of a contributing employer are accounted for. This is typically done by comparing payroll totals with IRS 941 quarterly earnings forms. If access to basic tax and payroll data is withheld there is *no* way for the auditor to know whether other

[1] The fact that Central States obtained an injunction to preserve a variety of "pertinent records" (R.B., pp. 6-7; D-44) for future use does not mean that such records will be utilized unless necessary for a "reasonable" audit (M.B., p. 14-15, 30-31).

payrolls exist which could include individuals performing bargaining unit work or whether an employer has made cash disbursements to employees who might be covered by the collective bargaining agreement. Significantly, Transport's *own* Amicus, does not rebut the proposition that an independent verification of data through tie-in procedures is a proper accounting technique (Am. B., pp. 13, 16-18). (Amicus merely suggests alternatives which are less complete, less independent, and potentially more expensive, thus exposing the Funds to greater risk.) Transport nevertheless states that the Funds "have not and cannot demonstrate how their interests will be prejudiced if they are required to show 'reasonable cause' to conduct an audit of records for any non-bargaining unit employees" (R.B., p. 48).

Once this preliminary stage of the audit is concluded, the auditor merely checks some personnel files of employees listed on payrolls of "noncovered employees" to verify that they are not performing unit work. Central States does not request sensitive data from the personnel files of noncovered employees (see D-14, pp. 5,6).[2]

Central States also offers substantial safeguards to protect confidentiality (P.C., pp. 25-26; M.B., p. 15; D-8, pp. 7, 8, 20; D-14, pp. 3-8; D-16, p. 4). Contrary to Transport's assertions, the record reveals that these safeguards were offered to the company *long before* the 1982 *Theut Products* discovery and protective order (App. I P.C.) was adopted as standard audit policy. Indeed, the district court in 1981 was "mindful" of these assurances of confidentiality and the safeguards proposed when it balanced the employer's confidentiality interest against the Trustees' need for information (App. A P.C., p. 11). The court of appeals ignored these safeguards totally, and Transport states: "The Funds have proposed no mechanism for protecting the legitimate confidentiality interests of Transport and the majority of its employees" (R.B., p. 45).

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[2] However, in order to ascertain the regularity of employment, drivers' logs, trip manifests, leases, bills of lading and the like may be requested for "owner-operators" who are reported as "independent contractors" on IRS 1099 forms (M.B., p. 15; R.B., p. 47). Disciplinary letters in personnel files may also be requested to show actual "direction and control" in those jurisdictions in which courts require a showing of "employee" status on the basis of common law agency principles and not merely transportation law. Central States knows of no authority that requires an employer to keep personnel files on independent contractors and then to withhold information on the grounds of "employee confidentiality."

In 1980, a limited audit of Transport resulted in findings of $268,362.50. Transport omits these numbers which the court of appeals termed "instances of apparent underreporting" (App. B P.C., pp. 17, 30) and Deloitte, Haskins & Sells terms "immaterial" Am. B., p. 9).[3] The audit also revealed that Transport made contributions on behalf of four employees whose names did not appear on the payroll of concededly covered employees *or* on a seniority list. Transport did not explain the discrepancy. M.B., p. 9. The Sixth Circuit would permit Central States to extend its audit of concededly covered employees to the records of these four persons *only!*[4]

Three critical facts central to the resolution of this dispute have been either misapprehended or misstated.

First, the alleged delinquencies ($268,362.50) and discovery of four employees whose coverage status was unclear were the *result* of the audit; these findings did not *trigger* the audit as the court of appeals believed. Random audits cannot, by definition, be *triggered* by audit findings! For the same reason, it is virtually impossible for trustees in advance of a random audit to satisfy a "particularized reasonable cause standard" for disclosure.

Second, contrary to Transport's assertion (R.B., p. 3), Central States *never accepted* as "an uncontroverted fact which was part of the stipulated District Court record" that "60% of Transport's employees *are not covered by the collective bargaining agreement*." Verification of this allegation became a primary audit objective. *See*, for example, D-8, p. 16: "In the present case, it might well be regarded

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[3] See M.B., p. 8, fn. 8. Audit findings never represent more than potential liability which is subject to further conciliation or adjudication. All unknown or uncollected delinquencies contribute to a plan's unfunded vested benefits liability (see P.C., p. 8, fn. 7). Employers required to make up funding gaps or pay "withdrawal liability" would not regard $268,362.50 as immaterial.

[4] In *Central States, et al. v. R-W Service System, Inc.*, No. 82-1899 (Aug. 25, 1984), the Sixth Circuit refused to permit the Funds to complete an audit begun in 1978 although the company *paid $150,000.00 in delinquent contributions pursuant to that incomplete audit*. The basis of the scope limitation was the Funds' inability to show "reasonable cause" on an employee by employee basis. A showing of *actual delinquencies* was deemed insufficient cause. (*See* Government's Amicus Brief, p. 22 for a criticism of this standard; *see also* Deloitte, Haskins & Sells, pp. 10, 11, 14, 18.) The court also remanded an order compelling R-W to authorize the production of records in its constructive possession since it had destroyed the "pertinent records" necessary for completion of the 1978 audit (App. B).

as a breach of fiduciary duty were the Trustees simply to accept Defendants' statement that 60% of their employees are not covered by collective bargaining agreements without requiring any objective substantiating documents such as IRS forms." *See also* D-9, p. 11; D-14, p. 4; D-16, p. 3.

Third, the court condemned Central States' audits as a waste of fund assets without *any evidence* in the district court record as to the cost of the audit program relative to delinquencies collected or even as to the cost of the audit of Transport (*see* M.B., p. 17, fn. 20). A major theme in Transport's Brief, however, is that the Funds would be "wasting" assets if allowed to conduct "overreaching" audits (R.B., pp. 12, 41). Central States has already explained why its field audit program is *essential* to the health of the Funds and must be regarded as the "ordinary and natural" means for achieving express objectives set forth not only in ERISA but also in the applicable Trust Agreements. Thus far, Central States has attempted to establish its position with facts presented to the district court, relevant statutes, contracts, legislative history, and numerous cases showing how audits by other funds have uncovered delinquencies in a variety of factual situations, cases which Transport has largely chosen to ignore.

Petitioners believe that they are now compelled to rebut continuous speculative assertions about wasteful audit costs with a statement of fact that was not in the district court record:[5] the incomplete field audit of Transport in February and March, 1980 cost $24,424.28 and resulted in findings of $268.362.50 (App. C). Amicus Arthur Young noted that its study of Central States' audit records shows a potential 7-1 return for the period July, 1983 through July, 1984 based on findings totaling $5,540,000.00 at a cost of about $770,000.00 (Am. B., p. 17, fn. 7). Based on the O'Sullivan Affidavit (App. H P.C., pp. 83-84), the *incomplete* audit of Transport indicates a potential 10-1 return, which suggests that this audit was cost effective. Moreover, random general audits are also important for their deterrent effect.

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[5] To the extent this Court wishes to entertain the issue of costs in evaluating the permissible scope of an audit, Petitioners respectfully request that consideration be given to the information presented below. This information derives from records available to the DOL and IRS and has been included here under the authority of Supreme Court Rule 35.4 as interpreted in *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975).

Of significance is also a recent GAO report to Congress[6] indicating that many multiemployer plans have incomplete participant data, which affects the reliability of the actuarial valuations that underlie a plan's funding and benefits scheme. The Comptroller General noted, *inter alia*, that the DOL considers it part of ERISA's "prudent person" rule to make "reasonable and diligent efforts to collect participant data" (p. 12). Plan Administrators commented that missing data was partly due to a lack of cooperation by employers and unions. The GAO does not believe that the "prudent man" rule is *sufficient* to remedy the problem and recommends that the DOL issue regulations for the collection of participant data. Among other things, this "could provide plan administrators with additional leverage to gain the cooperation of reluctant employers and unions" (p. 31). The report focuses primarily on incomplete data on *disclosed* participants, especially missing or erroneous birthdates. It does not suggest that plans institute field audit programs such as that maintained by Central States in order to obtain the data needed. The fact is, however, that Central States' audits not only reveal reporting discrepancies related to *concededly covered participants; they also uncover the existence of undisclosed participants*. The "limited scope/ reasonable cause" approach to audits is in conflict with the GAO report and will exacerbate the problem of incomplete participant data and underfunding. The objections of Transport and its Amicus to Arthur Young's position that incomplete participant data could trigger a qualified opinion from the plan's independent accountant is also belied by the report (p. 30).

Recapitulation of issues and arguments

Central States' "Question Presented" sets forth with particularity the nature of the problem to be resolved as well as the basic contours of its argument in support of a comprehensive field audit program. In response, Transport argues, *inter alia:* that random general audits would undermine the collective bargaining process because they would lead to the "imposition" of Central States' Plans on "all

[6] Comptroller General of the United States, *Report to the Congress, Incomplete Participant Data Affect Reliability of Values Placed by Actuaries on Multiemployer Pension Plans*, GAO/HRD 84-38, "Data Reporting and Use" (September 6, 1984).

employees" of contributing employers without regard to the labor agreement (p. 46, fn 35); that such audits are designed to expand the bargaining unit and not to perform a fiduciary duty to participants and beneficiaries;[7] that such audits would result in inter-trustee competition for participants (and hence multiple lawsuits, pp. 14, 15, 37-40);[8] that such audits would result in the forfeiture of vesting service credit of any employee shifted from one plan to another (pp. 14, 38);[9] and that records of nonunit employees are "irrelevant" and beyond the scope even of the Federal Rules of Civil Procedure (p. 42.)[10]

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[7] *See* fn. 3, *supra*. Any "expansion" of the Central States pool will result from an *adjudication of coverage under the collective bargaining agreement by an arbitrator or a court*. The notion that Central States will "impose" its Plan on everyone regardless of operative labor agreements is preposterous. Similarly absurd is the statement that Central States claims a "fiduciary duty to each and every noncovered employee" (R.B., p. 32). The suggestion that Central States uses the threat of an audit to coerce employers into settling claims for delinquent contributions not otherwise owed (R.B., pp. 14, 37, 41) is outrageous and unsupported.

[8] No authority is cited for this absurd proposition. (The absence of cases indicating inter-fund competition for participants is telling, for it suggests that such disputes do not arise, are settled consensually, or are covered by reciprocal agreements such as described in *Nichols v. Trustees of Asbestos Workers Pension Fund*, 3 EBC 1756 (D.D.C. 1982).) Should a controversy over "jurisdiction" arise involving trustees, courts would be competent to resolve it as a "work coverage" dispute as in *Laborers v. Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983).

[9] This is a particularly egregious suggestion because it implies that predatory trustees could cause powerless employees to suffer forfeitures of vesting service credit upon being shifted from one plan to another. In fact, the plan to which an employee is shifted as the result of an audit would be required by ERISA to credit and fund all hours of service earned in covered employment. If a reciprocal agreement exists, the plan could recover contributions from the plan to which the employee first belonged. If not, the plan would have to seek contributions from the employer. To avoid paying twice, the employer could attempt to recoup payment from the first plan under 29 U.S.C. § 1103(c)(2)(A). It cannot be overemphasized that the employee himself cannot lose! Participants are entitled to vesting credit and benefits *regardless* of whether an employer pays or defaults on his contributions (M.B., p. 10).

[10] This may be swiftly rebutted by reference to *McNeff v. Todd*, 461 U.S. 260 (1983) and *Byrnes v. DeBolt Transfer*, 741 F.2d 620 (3d Cir. 1984), in which employers refused to produce pertinent records consensually but were compelled to do so in pretrial discovery. It is precisely because Central States does not wish to file expensive, time consuming, and burdensome lawsuits to compel audit records through discovery that comprehensive *consensual* audits are requested.

More concretely, Transport (and/or its Amicus) argues that Central States does not *need* the audit requested. First, unions can be relied upon to assure against employer misconduct by virtue of the duty of fair representation (p. 31); the right to seek a unit clarification before the NLRB;[11] and the ability to invoke the grievance mechanism of the labor agreement (p. 31). Second, union dues check-off lists are sufficiently complete, independent and objective to be used as the basic tool for verifying the accuracy of reporting (R.B., pp. 29-30; Am. B., pp. 16-17). Third, employees can and should be relied upon to vindicate their own rights to benefits (pp. 31-33).[12] Fourth, if the Court does not find a duty to audit records of "noncovered" employees, Central States will be insulated from liability should a "nonparticipant" make a claim.[13] Finally, Transport is a large financially solvent company which would be capable of satisfying a judgment should a recoupment action for retroactive delinquencies ever be necessary (Am. B., p. 14).[14]

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[11] Trustees have no standing to seek a "unit clarification" and they could not compel the union to address the NLRB. Courts are generally loath to deprive ERISA trustees of a federal court forum in deference to the "primary jurisdiction" of the NLRB. *See Kaufman & Broad, supra,* and *Carpenters v. Pratt-Farnsworth,* 690 F.2d 489 (5th Cir. 1982).

[12] The Solicitor of Labor (on behalf of the DOL) agrees with Central States that employees would not be estopped from claiming benefits merely because they failed to take action themselves to secure them (Am. B., p. 26). As the Agency entrusted with enforcing ERISA, the DOL's views are entitled to great weight. *Skidmore v. Swift,* 323 U.S. 134 (1944). As a practical matter, employee efforts to monitor employer reporting would provide extremely limited protection to the Funds even were employees sufficiently knowledgeable about their legal rights to make a complaint *and* were also *aware* their employer was cheating. (*See* P.C., pp. 15, 16, fn. 15.) DOL Reg. 29 C.F.R. § 2520.140b-1(b)(1) (Disclosure) states that "in no case is it acceptable merely to place copies of [material required to be disclosed to participants] in a location frequented by participants." But *see* R.B., p. 33. In accordance with the Sixth Circuit's "particularized reasonable cause standard," the Trustees could audit *only the records of the particular employee who complained! (See* fn. 4, *supra.)* There are about 500,000 *disclosed* participants and beneficiaries in the plan. No one knows how many *undisclosed* participants exit. A case by case approach to audits is a patently inefficient method for securing employer compliance.

[13] This miscasts the issue. An employee performing unit work is not a "nonparticipant" merely because he has not been reported.

[14] The possibility of a later recoupment action, as suggested by the Sixth Circuit, would not safeguard the Funds. There is no way to predict

Footnote continued on next page.

This reply will focus on five issues: 1) the contractual right to audit; 2) the relevance of the IRS and FLSA analogy; 3) the inability of the Union to assure against employer misconduct; 4) the discretionary nature of audits and the distinction between a *right* to audit and *a fiduciary duty* to audit; and 5) the proper balance to be struck when confidentiality claims are raised.

ARGUMENT

I. THE TRUSTEES' INTERPRETATION OF THE TRUST AGREEMENTS IS REASONABLE IN LIGHT OF THE PURPOSES OF ERISA

The Sixth Circuit held and Transport insists that the Trustees' interpretation of the Fund Trust Agreements should be disregarded despite the fact that these instruments bestow plenary powers of construction on the Trustees and that good faith interpretations are expressly binding on employers, employees and unions (Art. IV, Sec. 17). *Schneider Moving and Storage v. Robbins*, 104 S. Ct. 1844, fn. 18 (1984). The Trustees' construction of the term "pertinent records" in the audit clause of the Trust Agreements (Art. III, Sec. 5) is entitled to great deference unless it can be shown that this construction has *no* basis in fact or law. In fact, unless the term "pertinent records" cannot under *any reasonable interpretation* encompass verification data relating to all persons employed by an employer, a reviewing court has no authority to intrude on Trustee discretion and substitute its wisdom for that of the Trustees. *See* P.C., pp. 17-18; 26-29; M.B., pp. 46-48; *Riley v. MEBA Pension Trust*, 520 F.2d 406 (2d Cir. 1977). Any other alternative

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Footnote continued from previous page.

whether *any* company will be financially solvent in the future when employees may make claims on the Funds and the Funds discover reporting omissions. Several of the original Defendants at bar are no longer contributing to the Funds at this time and several no longer exist as distinct entities. The implication by Transport and its Amicus that all the Defendants are large and financially solvent operations is unsupported and untrue. Moreover, delay is inherently prejudicial to the Funds because of the risk of bankruptcy. It is well-known that bankruptcies are rampant in the trucking industry. Central States' accounts receivable (reported to the government on Form 5500) have increased in the past three years. The greatest increase is due to receivables attributable to bankrupt companies. Access to records of companies that have undergone corporate restructuring or bankruptcy may well be problematic.

would hinder centralized trust administration and militate against the creation of uniform fiduciary standards as Congress contemplated.

Significantly, the term "pertinent records" has been in the Trust Agreements since the 1950s. In 1974 and again in 1980, these instruments were carefully reexamined and revisions made to assure that they effectuated the purposes set forth by Congress in ERISA and MPPAA. Among these purposes is the vigorous enforcement of employer contributions on behalf of *all* persons who *in fact* perform work covered by operative collective bargaining agreements. In 1974, the Trustees were well aware that the success of their enforcement strategies depended in part on obtaining sufficient access to employer records to verify that an employer was remitting *all* required contributions. The term "pertinent records" was left unchanged because the Trustees believed this term would afford sufficient flexibility to make each audit "reasonable" in the circumstances while also affording sufficient access to data to implement Congressional mandates on collection, funding and disclosure to plan participants. As this Court has stated: "Contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed." *Tennessee Bond Cases*, 114 U.S. 663, 688 (1885), quoting *Florida Central Railroad Co. v. Schutte*, 103 U.S. 118 (1880). *Accord*, *Aetna Casualty & Surety Co. v. Woods*, 565 S.W.2d 861, 864 (Tenn. 1978); Restatement, *Contracts* § 236(f). *See also Schneider, supra*, fn. 5. In light of the Congressional policies the Trustees seek to implement through their field audit program, a broad construction of the term "pertinent records" is reasonable, rational, logical, and, after 25 years, consistent.

The court of appeals had no justification for translating the term "pertinent records" into the narrowest possible subset, records of "concededly covered employees." Significantly, the *CRST* panel on which the court relied, never *analyzed* this phrase. *See Central States, et al. v. CRST*, 641 F.2d 616 (8th Cir. 1981). Nor did the Sixth Circuit; it merely made a sweeping conclusion. Surely, the Trustees could have used the term "employee" had they intended to limit the scope of their on-site audits to the records of

"concededly covered employees." It is unreasonable to assume that the Trustees would have established a field audit program and obtained contractual agreement to physical entry on an employer's premises, without having equipped themselves with the power to verify an employer's representations of coverage. The contention that the Trustees' interpretation of the term "pertinent records" is tantamount to making every employee a participant in Central States' plans clearly strains both logic and syntax. The court incorrectly disregarded the reasonableness of the Trustees' interpretation and ignored their clear intent. As the Government also believes (Am. B., pp. 26-29), the Trust Agreements, properly construed, provide a contractual right to conduct random general audits.

II. CENTRAL STATES NEEDS THE TYPE OF AUDIT REQUESTED

a) The IRS and FLSA analogies

Transport objects that Central States has set itself up as a quasi-governmental agency, requesting investigative and subpoena powers without benefit of a statute, merely because federal law covers pensions and ERISA states a lofty goal (R.B., p. 23). Transport misses the point. Central States only argues by analogy, a traditional method of establishing law: "courts should not only apply statutes in those situations directly covered by their terms, but should reason from them by analogy to establish law in related areas, in the same way that judicial precedents are employed to control cases that are analogous, but not idential"[15]. The purpose of reading statutes analogically is to better understand the general social reasons that underlie a particular act and thus the specific problem to be cured.

The Funds operate of necessity by means of a self-reporting system. Hence, the need to monitor employer reporting in *this* self-reporting system may reasonably be measured by the need to monitor reporting in *other* self-reporting systems. If human behavior is such that self-reporting systems inherently generate an incentive to evade a *particular obligation*, and if such systems also *provide the*

[15] "The Relevance of Legislative Facts in Constitutional Law," 114 *U. Pa. L.R.* 637, 640, fn. 6 (1966), summarizing Landis, "Statutes and the Sources of Law," *Harvard Legal Essays* (1934), 213-46.

possibility for evasion, then the issue is one of finding an appropriate *methodology* to curb such behavior and to identify evaders. The critical distinction is therefore not one between "public" and "private;" the issue is whether Trustee audits of contributing employer records could serve an analogous function in promoting the underlying social goals and explicit objectives of ERISA that IRS and DOL audits serve in promoting the underlying social goals and explicit objectives of the IRC and the FLSA. If Trustee audits do *in fact* serve these purposes, then the *methodology* must be regarded as *prudent* and hence authorized by 29 U.S.C. § 1104(a)(1)(B) and the Trust Agreements unless a *countervailing evil* can be shown. Transport has cited no facts or authority showing that Fund audits are or cause evil. The Trustees never claimed subpoena powers.

b) Union efforts do not afford an adequate safeguard

In *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), this Court stated that unions do not owe an affirmative duty of fair representation to retirees since they are no longer members of the bargaining unit. In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), this Court suggested that unions can legitimately strive to maximize overall compensation for the bargaining unit as a whole even if this means sacrificing individual elements of the compensation package. Finally, in *Schneider Moving & Storage v. Robbins*, 104 S. Ct. 1844, 1851 (1984), this Court just last term stated that unions do not owe a duty of fair representation to trustees.

For these reasons and in view of a fiduciary duty to retirees, the Court agreed that it would be unreasonable for trustees to *rely on the union* to prosecute their disputes with employers through the grievance mechanisms of collective bargaining agreements, particularly where governing Trust Agreements appeared to contain plenary enforcement powers. The Court noted that if the "Union disagreed with the trustees' construction of the agreement, it could refuse to arbitrate the claim, or compromise the trustees' position in arbitration," which would adversely affect the outcome of any subsequent judicial proceeding under *Steelworkers* principles (p. 1851; fn. 21).

This reasoning conflicts with the notion that trustee access to records *for audit purposes* should properly be

limited by a prior determination of coverage by the Union and the employer, as advocated by Transport and the Sixth Circuit in reliance on *Central States, et al. v. CRST*, 641 F.2d 616 (8th Cir. 1981). (In 1983, the Eighth Circuit *en banc* already *concluded* that *CRST* was incorrectly decided. *Robbins, et al. v. Prosser, et al.*, 700 F.2d 433 (8th Cir. 1983), *aff'd* by this Court in *Schneider, supra*. Although the Eighth Circuit did not *judicially* determine *on the merits* the permissible scope of a trustee audit, it repudiated the idea that trustee audit rights can be limited by any actions of the employer or the Union unilaterally or *inter sese*.) From the foregoing it is clear that it would be unreasonable for the Trustees to rely on unions to monitor employer reporting and to ferret out undisclosed or misreported participants even if they were in an informational position to do so.

Local unions, however, are *not* in an informational position to supplant or even to supplement the Funds' audit function with any degree of reliability. Article 24 of the NMFA does *not* provide the Union with the right to conduct *random routine* audits (App. A, p. 10). Similarly, the NMFA Supplemental Agreements provide access to records concerning only individual pay disputes and specific grievances (App. A, p. 13). In accordance with case law defining the scope of Section 8(a)(5) of the NLRA, these inspection rights could be expanded, *infra*. However, the Union would *first have to show specific operative facts*, such as actual conduct threatening to destroy the integrity of the bargaining unit or industry standards. *Hollywood Brands v. NLRB*, 53 L.R.R.M. 1-12 (1963), *aff'd*, 324 F.2d 956 (5th Cir. 1963); *Curtiss-Wright v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *NLRB v. Rockwell Standard*, 410 F.2d 953 (6th Cir. 1969). In contrast, random fund audits are not predicated on a showing of "operative facts." Moreover, the Funds could as little compel the Union to obtain records through 8(a)(5) unfair labor practice proceedings as it could compel the Union to arbitrate coverage disputes. *See Schneider, supra*. Yet the Funds not the Union, are financially liable.

Nor can Unions *physically* monitor employer reporting with any degree of completeness, particularly in industries populated with seasonal or transient employees. A large number of Central States' contributing employers are engaged in the trucking industry, many under the NMFA. The

main contract expressly covers "owner-operators";[16] several supplements also cover "casuals." An "owner-operator" on the payroll for 30 days or more is currently entitled to a pension contribution of $55.00 per week. Likewise, an Over-the-Road or Local Cartage "casual" is currently entitled to an $8.00 contribution for each "tour of duty" (R.B., pp. 29a-31a). "Owner-operators" are typically dispatched from their homes and travel from shipper to receiver without reporting to a terminal. "Casuals" may work for several carriers in the same week, servicing sudden influxes of work or filling in as replacements for absentee regulars (App. A, p. 7). Unions cannot keep track of the employment of such drivers so as to assure correct reporting. Shop stewards are *not* on duty in terminals 24 hours a day and are often on the road themselves. (See R.B., p. 30). Moreover, of all the NMFA Supplements, only Local Cartage requires employers to remit monthly lists of casuals (App. A, p. 13). However, the Union *must rely* on the employer to list *all casuals who in fact* work. Such information is not readily verifiable.

The Sixth Circuit thought that seniority lists could serve as effective indicia of employer compliance. Transport and its Amicus plead for reliance on dues check-off lists. However, both lists are *generated or supplemented by the employer not the Union* (App. A, pp. 8, 10). Although employees may complain if their names do not appear on posted seniority lists, they may have incentives not to do so. A newly-hired employee is the first to be laid off under the NMFA and is particularly vulnerable to coercion by an employer if he presses for the contributions that accrue with seniority. A new seniority employee may also wish to avoid union dues or initiation fees and may not object to the absence of his name on the list, especially if long-term employment seems doubtful. The critical fact is: the *employer* is in a unique position to know which employees are entitled to seniority because they have fulfilled the requisite probationary period. Thus, the Union must largely rely on the employer to list employees appropriately.

The same is true of dues check-off lists. A careful reading of Article 3, Section 3 (R.B., p. 30) reveals that

[16] In *Local 24, IBT v. Oliver*, 358 U.S. 283 (1959), this Court upheld the "owner-operator" provision of the NMFA against a state antitrust challenge. Speaking for the majority, Justice Brennan stated that these drivers' terms and conditions of employment were mandatory subjects of bargaining.

once the Union has generated *a baseline list*, for example, upon organizing a company, it must *rely on the employer to add new employees* to the previously certified list each month as well as to delete terminated employees. Unions may have difficulty ferreting out employees who do not voluntarily authorize dues check-off. Hence, the Union is in an analogous position to the Trustees who *must also rely on employers to report fluctuations in the base group* initially reported. *See* M.B., p. 12. It may also be noted that "casuals" are, by definition, *not* "seniority" employees and would not appear on either of these lists. (Significantly, while the Funds are entitled to contributions on behalf of casuals, the Union is not entitled to dues unless a casual achieves seniority and thus becomes a regular employee.) Similarly, "owner-operators," believed by the carrier to be "independent contractors," would also be omitted. *See Byrnes v. DeBolt Transfer*, 741 F.2d 620 (3d Cir. 1984). In sum, the Funds are being asked to rely on the Union which itself has to rely on the employer. This would not adequately protect the Funds. Contrary to Transport's contentions (R.B., p. 34), a company would have substantial incentive not to report "casuals" and "owner-operators." Because these employees are not easily traceable, the danger of grievances, unfair labor practice charges, or economic action would be minimal, and the company could save a lot of money.[17] Side arrangements may also exist. *Central States et al. v. Kraftco, Inc.*, 589 F. Supp. 1061 (M.D. Tenn. 1984; appeal pending); *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981).

c) Audits are discretionary: the *right* to audit is *distinct from a fiduciary duty to audit*

Transport argues that if this Court grants Central States' Trustees the right to conduct the audit requested, the Court will thereby also enlarge the scope of ERISA's fiduciary duty rule and hence impose new surveillance obligations on unsuspecting Trustees (R.B., pp. 15, 40). The ultimate result, Respondent says, will be that trustees of every fund

[17] The omission of "casuals" is just one of a series of abuses Fund audits are designed to prevent. However, the problem is serious. Indeed, the Fund recently discovered, through an audit, nonreported casuals with contributions owing in excess of $300,000.00 from a single employer. The company has paid the amount discovered.

will have to audit every record of every employer every year beginning with 1975 when ERISA took effect at a "staggering" cost both to the funds and to contributing employers. This is patent nonsense.

ERISA's "fiduciary duty" rule is circumscribed by notions of "prudence," "reasonableness" and due care in the "circumstances." Central States is a very large fund that operates on a self-reporting system and contains actual or potential participants whose existence easily eludes the eye of the Union and who may also be covered by "right to work" laws so that Union records may not be available for corroboration. Its Trustees, familiar with circumstances pertinent to the *Central States Funds*, have determined on the basis of experience that random general audits protect Fund integrity. Amici Bricklayers and NCCMP have concluded likewise with regard to their funds. The Solicitor General and the Solicitor of Labor believe random general audits are justifiable and fall within the *permissible* (as opposed to *mandatory*) reach of ERISA. These Amici also agree with Petitioners that Congress left the task of monitoring employer contributions *primarily* to fund trustees and not to the government (Am. B., p. 20). If trustees of other funds do not believe such audits are necessary, they are free, at their *discretion*, to devise other strategies for monitoring contributions. *See Nichols v. Asbestos Workers, supra*. So long as such methods are "prudent" and "reasonable" in the circumstances, they, too, will fall within ERISA's fiduciary duty rule. Petitioners do not ask this Court to mandate that *all trustees of all funds* follow the Central States field audit program.

III. THE TRUSTEES' NEED FOR INFORMATION OUTWEIGHS TRANSPORT'S INTEREST IN THE CONFIDENTIALITY OF EMPLOYEE RECORDS

Central States believes that the privacy interests of *covered as well as noncovered* employees should be a legitimate concern both of society at large and employers in particular. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). This is why the Trust Agreements expressly protect the confidentiality of participants' names and addresses (Art. III, Sec. 5) and why Fund audits are subject to substan-

tial safeguards to protect the confidentiality of *all records*, particularly from unconsented disclosure to third persons (App. I P.C.). However, as Transport concedes, the right to privacy is neither absolute nor abstract (R.B., pp. 43-47). Certainly, it is well-established that the "zone of privacy" protected by the Constitution is carefully circumscribed. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The individual's right to be left alone cannot and should not be elevated into a right to obstruct remedial legislation.

In the context of collective bargaining, the key to disclosure is "relevance" and the liberal discovery standard applies to Union requests for information. *NLRB v. Acme Industrial Corp.*, 385 U.S. 432 (1967). The *same* standard applies whether the information sought concerns unit or nonunit members; it is only the *burden of establishing relevance* that shifts. Thus, data involving *unit employees* or mandatory subjects of bargaining is generally regarded as *presumptively relevant* whereas data involving *nonunit employees* or bargainable issues is generally regarded as *demonstrably relevant*. *See* cases cited, *supra*, p. 13; *Oil, Chemical & Atomic Workers Local v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). The "particularized reasonable cause standard" imposed on the Trustees by the Sixth Circuit *does not coincide* with NLRB principles. It is far more stringent a threshold for disclosure than the showing of "probable" or "potential" *relevance* articulated by this Court in *Acme, supra*,[18] even though the interests served by the Funds are far broader than those served by a Union.

Since *Detroit Edison*, of course, relevance is not the whole answer. The NLRB and reviewing courts are required to ask additional questions and balance other factors: for example, whether the materials requested are truly sensitive; whether they can reasonably be sanitized; whether alternative or sanitized data is adequate; whether express promises of confidentiality have been made with respect to the materials requested; whether a legitimate expectation of privacy exists with respect to such data; whether consent to disclosure should be required; whether

[18] The "particularized" cause standard also goes far beyond that imposed on OSHA investigators in *Marshall v. Barlow's*, 436 U.S. 307 (1978), cited by Transport at R.B., pp. 11, 24. Rejecting warrantless searches as a violation of the Fourth Amendment, the Court also rejected the notion of "probable cause" based *only* on "specific evidence of an

Footnote continued on next page.

the burden of obtaining consent is possible, minimal, or oppressive; whether the party seeking disclosure has an incentive to "leak" information or to use it impermissibly; whether it has done so in the past; whether even inadvertent leaks would cause substantial harm; and whether the person resisting disclosure has a motive to withhold information that is unrelated to a legitimate interest in confidentiality. Central States has already addressed most of these questions and demonstrated that, on balance, the Trustees' need for information outweighs Transport's interest in the confidentiality of its employee records. However, some additional comments are appropriate.

First, Central States primarily seeks information corroborating job classification as well as the completeness of an employee population. Significantly, the Privacy Protection Study Commission (referred to by Transport at p. 48) designates wage and job classification data as "Directory Information" and excepts it from a pre-disclosure consent requirement. (*See Personal Privacy in an Information Society*, App. 3, "Employment Records" (1978), pp. 96-99).[19] Second, there is nothing in the record establishing that Transport made an express promise of confidentiality to "noncovered" employees. Third, "noncovered" employees can have no realistic expectation of privacy concerning basic tax, payroll, and directory-type information since unions may be entitled to this information and more, upon a proper showing, under Section 8(a)(5) of the NLRA. The employer could not keep a promise of confidentiality in such a situation and nonunit employees may properly be said to have constructively waived the right to privacy by accepting employment with an employer

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Footnote continued from previous page.

existing violation." A lawful warrant need only show "that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . ." (p. 321). Fund audits are predicated on an analogous concept of cause.

[19] Transport also refers to state "Miniprivacy Acts." These state laws seem primarily designed to permit an employee to obtain access to his own records or to prohibit the dissemination of such information to third persons for reasons unrelated to the purpose for which such records were collected and maintained. 29 U.S.C. § 1059 requires employers to keep records for *all* of their employees to enable a Plan Administrator to determine the eligibility and benefit status of plan participants. Fund audits do not violate the underlying polices of state "Miniprivacy Acts." To the extent state laws could be used to vitiate the purposes either of the NLRA or ERISA, they would be preempted.

who has organized operations subject to federal law. Fourth, Central States has agreed to accept "sanitized" information about management personnel. Fifth, the task of obtaining individual employee consent would be burdensome, if not impossible. Sixth, Transport has not shown that Central States ever "leaked" employee records or used them in a manner unrelated to proper fund administration as required by the Trust Agreement. Seventh, Transport has not shown that Central States has an "incentive" to "leak" information to unions or competing employers in violation of the neutrality rule imposed on fund trustees as ERISA fiduciaries in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). Eighth, Transport has not shown how irreparable harm would result from an inadvertent leak. Finally, Transport has offered no viable alternatives to fund audits because it refuses to acknowledge that a "public interest purpose" exists underlying the request for information.

The latter factor causes Transport's FOIA and Privacy Act analogy to fail. The Freedom of Information Act (5 U.S.C. § 522) is a "sunshine" act. Thus, its nine express statutory exemptions have been narrowly construed and are also regarded as exclusive. *EPA v. Mink*, 410 U.S. 73 (1973). Exemption 6, however, covers medical, personnel and similar files (5 U.S.C. § 522(b)(6)). FOIA requests for such files may be refused by a governmental agency *if* disclosure would be a "clearly unwarranted invasion of personal privacy." Hence, a balancing test is required to determine whether a "*public interest* purpose" underlies a FOIA request sufficient to outweigh a *private interest* in confidentiality. If, on balance, disclosure of the information is *required* under the FOIA, it is *not protected* by the Privacy Act of 1974. (*See* 5 U.S.C. § 552(b)(2). Central States has established an important "public interest purpose" in support of its audits; the vast majority of records requested also represent a *de minimus* intrusion on personal privacy.

Central States *has* offered a mechanism to safeguard confidentiality. More importantly, Central States has an institutional incentive to prevent unauthorized disclosures. The success of its field audit program depends on the cooperation of employers; if confidential information is leaked to unions or competing employers, whether by negligence or design, employers will simply withhold the data. The analysis offered by Justice White in his *Detroit Edison*

dissent (Justices Marshall and Brennan concurring) speaks directly to this point and should apply by analogy to the facts at bar (440 U.S. at 323). However, even if trustees acted against the Funds' long-term interest and improperly disclosed confidential information, there are available remedies based on breach of contract or tort. In sum, Respondents should not be permitted to raise the privacy interests of their employees as a shield against legitimate inquiry on the speculative assertion that Central States will abuse its fiduciary powers. Ultimately, every worker who is or may become a participant in any ERISA plan has an interest in the accuracy of employer reporting. Hence, Transport's "noncovered" employees, who allegedly participate in other ERISA plans, also have a stake in Central States' access to records!

CONCLUSION

To resolve the dispute at bar, this Court must decide whether "random general audits," defined as "independent verification procedures," are "prudent" and therefore encompassed by ERISA and the Trust Agreements; for audits limited to the records of "concededly covered employees," as advocated by Transport and endorsed by the Sixth Circuit, are nothing more than an extension of the honor system that already exists with respect to employer reporting. The "particularized reasonable cause standard" effectively assures that *no one* — not Trustees, not the Union, not the Secretary of Labor — will be able to detect evaders and identify undisclosed participants except on an *ad hoc* piecemeal basis. Hence, if this Court permits the Sixth Circuit's ruling to stand, it should also carve an exception to the ERISA and DOL rule that eligibility depends on the performance of hours of service in covered employment regardless of employer defaults in contributions. In sum, if Central States' audits are "fishing expeditions" (R.B., pp. 10, 22, 24, 42), its Trustees are fishing with a license issued by Congress. Thus, unless this Court is prepared to insulate multiemployer funds from liability to participants whose employers failed to report them and who themselves did nothing to secure their entitlement to benefits, it must reverse the court of appeals' decision. If it does not, the correlation between disbursements from and contributions to such plans will be permanently and irrevocably skewed.

Respectfully submitted,

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Dated: November 15, 1984

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

PETITIONERS' APPENDIX

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APPENDIX

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Appendix A
Relevant Provisions
of the Collective Bargining Agreement

APPENDIX A

NATIONAL MASTER FREIGHT AGREEMENT

Covering
OVER-THE-ROAD
and
LOCAL CARTAGE
EMPLOYEES OF PRIVATE
COMMON, CONTRACT AND
LOCAL CARTAGE CARRIERS
For the Period of
April 1, 1976
through
MARCH 31, 1979

Appendix A
Relevant Provisions
of the Collective Bargaining Agreement

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3.

Recognition, Union Shop and Check-Off

Section 1.

Recognition

(a) The Employer recognizes and acknowledges that the National Union Committee and Local Unions affiliated with the International Brotherhood of Teamsters are the exclusive representatives of all employees in the classifications of work covered by this Master Agreement, and Supplements thereto for the purpose of collective bargaining as provided by the National Labor Relations Act.

Subject to Article 2, Section 3 (Non-Covered Units), this provision shall apply to all present and subsequently acquired operations and terminals of the Employer.

This provision shall not apply to wholly-owned and wholly independently operated subsidiaries which are not under contract with local IBT unions. "Wholly independently operated" means, among other things, that there shall be no interchange of freight, equipment or personnel, or common use, in whole or in part, of equipment, terminals, property, personnel or rights.

Union Shop

(b) All present employees who are members of the Local Union on the effective date of this subsection or on the date of execution of this Agreement, whichever is the later, shall remain members of the

Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this subsection or the date of this Agreement, whichever is the later. An employee who has failed to acquire, or thereafter maintain, membership in the Union as herein provided, shall be terminated seventy-two (72) hours after his Employer has received written notice from an authorized representative of the Local Union, certifying that membership has been, and is continuing to be, offered to such employee on the same basis as all other members and, further, that the employee has had notice and opportunity to make all dues or initiation fee payments. This provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act, but not retroactively.

Hiring

(c) When the Employer needs additional men he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union.

State Law

(d) No provision of this Article shall apply in any state to the extent that it may be prohibited by state law. If under applicable state law additional requirements must be met before any such provision may become effective, such additional requirements shall be first met.

Agency Shop

(e) If any agency shop clause is permissible in any state where the provisions of this Article relating to the Union Shop cannot apply, the following Agency Clause shall prevail:

(1) Membership in the Local Union is not compulsory. Employees have the right to join, not join, maintain, or drop their membership in the Local Union, as they see fit. Neither party shall exert any pressure on, or discriminate against, an employee as regards such matters.

(2) Membership in the Local Union is separate, apart and distinct from the assumption by one of his equal obligation to the extent that he receives equal benefits. The Local Union is required under this Agreement to represent all of the employees in the bargaining unit fairly and equally without regard to whether or not an employee is a member of the Local Union. The terms of this Agreement have been made for all employees in the bargaining unit and not only for members in the Local Union, and

this Agreement has been executed by the Employer after it has satisfied itself that the Local Union is the choice of a majority of the employees in the bargaining unit. Accordingly, it is fair that each employee in the bargaining unit pay his own way and assume his fair share of the obligation along with the grant of equal benefits contained in this Agreement.

(3) In accordance with the policy set forth under subparagraphs (1) and (2) of this Section all employees shall, as a condition of continued employment, pay to the Local Union, the employee's exclusive collective bargaining representative, an amount of money equal to that paid by other employees in the bargaining unit who are members of the Local Union, which shall be limited to an amount of money equal to the Local Union's regular and usual initiation fees, and its regular and usual dues. For present employees, such payments shall commence thirty-one (31) days following the effective date or on the date of execution of this Agreement, whichever is the later, and for new employees, the payment shall start thirty-one (31) days following the date of employment.

Appendix A
Relevant Provisions
of the Collective Bargaining Agreement

Savings Clause

(f) If any provision of this Article is invalid under the law of any state wherein this contract is executed, such provision shall be modified to comply with the requirements of State Law or shall be renegotiated for the purpose of adequate replacement. If such negotiations shall not result in mutually satisfactory agreement, either party shall be permitted all legal or economic recourse.

Employer Recommendation

(g) In those instances where subsection (b) hereof may not be validly applied, the Employer agrees to recommend to all employees that they become members of the Local Union and maintain such membership during the life of this Agreement, to refer new employees to the Local Union representative, and to recommend to delinquent members that they pay their dues since they are receiving the benefits of this Agreement.

Future Law

(h) To the extent such amendment may become permissible under applicable Federal and State Law during the life of this Agreement as a result of legislative, administrative or judicial determination, all of the provisions of this Article shall be automatically amended to embody the greater Union security provisions contained in the 1947-1949 Central States Area Over-the-Road Motor Freight Agreement, or to apply to become effective in situations not now permitted by law.

Appendix A
Relevant Provisions
of the Collective Bargining Agreement

No violation of Law

(i) Nothing contained in this Section shall be construed so as to require the Employer to violate any applicable law.

Section 2. Probationary and Casual Employees

A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty-day trial basis, during which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty days, the employee shall be placed on the regular seniority list.

In case of discipline within the thirty-day period, the Employer shall notify the Local Union in writing.

Any employee hired as a casual or part-time worker shall not become a seniority employee under these provisions where it has been agreed by Employer and Union that he was hired for casual or part-time work. The words "casual" or "part-time" as used herein are meant to cover situations such as replacement for absenteeism and vacations.

Any employee hired as a casual or part-time worker shall not become a seniority employee until he meets the requirements of the appropriate Suppiemental Agreement under which he is employed.

If employees are hired through an employment agency, the Employer is to pay the employment agency fee.

However, if the Local Union was given equal opportunity to furnish employees under Article 3, Section (1)(c), and if the employee is retained through the probationary period, the fee need not be paid until the 31st day of employment.

Section 3. Check-Off

The Employer agrees to deduct from the pay of all employees covered by this Agreement the dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions prior to the end of the month for which the deduction is made. Where laws required written authorization by the employee, the same is to be furnished in the form required.

The Local Union shall certify to the Employer in writing each month a list of its members working for the Employer who have furnished to the Employer the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted for such month from the pay of such member and the Employer shall deduct such amount from the first paycheck following receipt of statement of certification of the member and remit to the Local Union in one lump sum. The Employer shall add to the list submitted by the Local Union the names of all regular new employees hired since the last list was submitted and delete the names of employees who are no longer employed.

Check-off shall be on a monthly or quarterly basis at the option of the Union.

When an Employer actually makes a deduction for dues, initiation fees and assessments, in accordance with the statement received from an appropriate Local Union, he shall remit same no later than thirty (30) days from the date such deduction was made and in the event he fails to do so, he shall be assessed ten percent (10%) liquidated damages.

Where an employee who is on check-off is not on the payroll during the week in which the deduction is to be made, or has no earnings or insufficient earnings during that week, or is on leave of absence, the employee must make arrangements with the Local Union and/or the Employer to pay such dues in advance.

The Employer will recognize authorization for deductions from wages, if in compliance with state law, to be transmitted to the Local Union or to such other organizations as the Union may request if mutually agreed to, except DRIVE deductions which shall be made annually. No such authorization shall be recognized if in violation of state or federal law. No deduction shall be made which is prohibited by applicable law.

In the event that an Employer has been determined to be in violation of this Article by the decision of an appropriate grievance committee, and if such Employer sub-

sequently is in violation thereof after receipt of seventy-two (72) hours written notice of specific delinquencies, the Local Union may strike to enforce this Article. However, such strike shall be terminated upon the delivery thereof. Errors or inadvertent omissions relating to individual employees shall not constitute a violation.

ARTICLE 5.

Posting Seniority List

(d) The Union shall be entitled to a seniority list each six months upon request. The Employer shall post a seniority list at least once every twelve (12) months and shall maintain a seniority roster at the terminal. Protest of any employee's seniority date or position on such list must be made in writing to the Employer within thirty (30) days after such seniority date or position first appears, and if no protests are timely made the dates and positions posted shall be deemed correct. Any such protest which is timely made may be submitted to the grievance procedure.

ARTICLE 24.

Inspection Privileges

Authorized agents of the Union shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating working conditions, collection of dues, and ascertaining that the Agreement is being adhered to, provided, however, there is no interruption of the firm's working schedule.

Appendix A
Relevant Provisions
of the Collective Bargining Agreement

Central States Area
LOCAL CARTAGE SUPPLEMENTAL AGREEMENT

Covering

EMPLOYEES OF PRIVATE,

COMMON, CONTRACT AND

LOCAL CARTAGE CARRIERS

For the Period of

APRIL 1, 1976

Through

MARCH 31, 1979

Appendix A
Relevant Provisions
of the Collective Bargaining Agreement

ARTICLE 41.

Probationary Employees and Work Assignments

Section 1.

Probationary Employees

(a) A new probationary employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial basis, during which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members.

(1) Any new employee must work thirty (30) cumulative work days within any ninety (90) calendar day period and upon completion thereof, shall be considered a regular employee and placed on the seniority list. Such employee's seniority date for all purposes shall be established as of the first day worked in such ninety (90) calendar day period in which he meets the requirement aforementioned.

(2) Any day worked, regardless of whether or not he was used as a replacement, shall be counted in determining whether or not he has qualified under the above provisions. A man can gain seniority by qualifying under the above provisions only.

(3) It is further mutually understood that any employee who shall work a total of fifty-five (55) work days within

any twelve (12) month period shall also accrue seniority under the provisions of this article and in such instance his or her seniority date for all purposes shall be thirty (30) work days back from the day he or she works the fifty-fifth (55th) work day.

(4) No later than the 10th of each month, the Employer shall furnish an alphabetical list of all casuals worked during the previous month to the Local Union.

In case of discipline within the thirty-day period, the Employer shall notify the Local Union in writing.

ARTICLE 44.

Section 7. Examination of Records

The Local Union, Joint Local Area Committee, Joint State Cartage Committee, or the Joint Area Cartage Committee shall have the right to examine time sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute, or records pertaining to a specific grievance.

APPENDIX B

Not for Publication
No. 82-1899
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS HEALTH and WELFARE FUND, and JOHN E. DWYER,
Plaintiffs-Appellees,

v.

R-W SERVICE SYSTEM, INC.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed AUG 25 1984

Before: KEITH and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

Per Curiam. R-W Service System, Inc. brings this interlocutory appeal from an order of the district court requiring it to make available to Plaintiffs certain records concerning all of its employees and other records it may have, or that are reasonably obtainable from third parties. For the reasons set forth below, we reverse the district court and remand for further proceedings not inconsistent with this opinion.

I

Plaintiffs-Appellees, the Central States Southeast and Southwest Areas Pension Fund, and Central States Southeast and Southwest Areas Health and Welfare Funds, (the Funds) are multiemployer-employee benefit trust funds es-

tablished in accordance with Section 302 (c)(5) of the Labor Management Relations Act of 1947, as amended. (29 U.S.C. §186(c) (5), LMRA). Both Funds are also subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*

Defendant-Appellant, R-W Service System, Inc. (R-W) is a trucking company, and a signatory to the National Master Freight Agreement and supplemental collective bargaining agreements with various local unions. The collective bargaining agreements require that R-W make payments to the Funds on behalf of employees covered by the collective bargaining agreement. (''Covered'' employees). An employee is covered by the collective bargaining agreements if engaged in a job classification described in the Master Freight agreement or supplements. During all relevant times the collective bargaining agreements required specified weekly contributions on behalf of employees in the enumerated job classifications.

In 1978 Plainiffs brought suit on behalf of their participants and beneficiaries to collect delinquent contributions, to compel R-W to produce certain records, and submit to an audit. The district court assumed jurisdiction under § 301 of the LMRA and § 502 of ERISA. Plaintiffs filed a motion for partial summary judgment to compel Defendant to provide various records and to submit to an audit.

At issue in the present appeal is an order of the district court of November 2, 1982 compelling defendant to ''make personnel files and payroll data for *all* employees available to Plaintiffs.'' (emphasis in original). In addition, the district court ordered R-W to provide the Funds ''with all records that it presently maintains, as set forth in the Magistrate's Report and Recommendation . . . [and] with all records to the extent that they are reasonable [*sic*] obtainable from third parties.''[1]

[1] As set forth in the Magistrate's Report, the records subject to production included, *inter alia*, time cards or driver's logs, trip manifests, dispatch sheets, delivery receipts, bills of lading, freight bills, 941 F.I.C.A. Quarterly Returns.

Appendix B

II

In concluding Plaintiffs were entitled to have access to personnel and payroll records for *all* employees of R-W, the district judge was guided by another opinion from the same district in a similar case, reaching the same conclusion. *Central States, et al. v. Central Transport*, 522 F.Supp. 658 (E.D. Mich. 1981). However, subsequent to the filing of the notice of appeal in the case at bar (but before filing of briefs) this Court reversed the district court in *Central Transport* in a well reasoned opinion authored by Judge Kennedy. *Central States, et al. v. Central Transport*, 698 F.2d 802 (6th Cir. 1983) *petition for cert.* granted, 52 U.S.L.W. 3902 (June 18, 1984). R-W contends that the decision of the district court in the case at bar must be reversed in light of this Court's decision in *Central Transport*. Plaintiffs seek to distinguish *Central Transport*. We are of the opinion that this Court's opinion in *Central Transport, supra*, 698 F.2d 802 is dispositive in the case at bar with respect to the authority of Plaintiffs to examine records of noncovered employees. In *Central Transport* this Court held that a trustee does not have a statutory or contractual right under ERISA or the trust agreement to audit records of all employees of the defendants' employees. 698 F.2d at 810. Under *Central Transport*, a trustee has the authority to inspect the employer's books and records "if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement" but has not been classified as a covered employee. 698 F.2d at 810. (emphasis in original).

Plaintiffs have not suggested they have "reasonable cause" to believe that any *particular employee* is covered by collective bargaining but is not classified as a covered employee. The language of *Central Transport* is clear and Plaintiffs' attempts to distinguish the case are simply without merit. Accordingly, the decision of the district court must be reversed to the extent that it is inconsistent with the decision of this Court in *Central Transport*.

III

Defendant R-W also contends it has no obligation to produce records from third parties as is required by the order of the district court.

The district court stated:

> This Court also recognizes the anomaly that, although Plaintiffs are entitled to an audit from 1969-76, Defendant denies having posession of any records which date back that far. For this reason, the Court directs Defendant to provide Plaintiffs with records that are within its actual possession, as well as those records which are within its contructive possession (to wit, third parties).

The order further provided, "Defendant will provide Plaintiffs with all records to the extent that they are reasonably obtainable from third parties."

The production of these records is for the purposes of enabling Plaintiffs to conduct the audit of R-W.

Federal Rule of Civil Procedure 34 provides that a party may request any other party to produce relevant documents "which are in the possession, custody or control of the party upon whom the request is served." "A party may not be compelled to produce papers or things which are not in his possession, custody, or control . . ." 4A J.Moore, *Moore's Federal Practice* ¶ 34.17 (2d ed. 1983 revision), (footnote omitted). 8 Wright & Miller, *Federal Practice & Procedure*, § 2210 (1970). "Inspection can be had if the party to whom the request is made has the legal right to obtain the document, even though in fact he has no copy." *Id.* (footnote omitted).

The district court's order construes those documents within the possession of third parties as within the "constructive possession" of R-W. The court does not address the possession, custody, or control question in particular, with respect to each of the documents sought by Plaintiffs'

from third parties. It is appropriate for the district court on remand to consider, on a case by case basis, whether the documents sought by Plaintiffs are subject to production by the Defendant, and to consider any contentions of Defendant that it has no obligation to produce particular documents. For this Court to address on a document by document basis this issue at this point in the proceedings is at best premature as these contentions have yet to be addressed by the district court.

IV

In accordance with the foregoing, the decision of the district court ordering the production of all of employees' records is reversed in light of this Court's decision in *Central States, et al v. Central Transport*, 698 F.2d 802 (6th Cir. 1983), and the case is remanded to the district court for further proceedings. The district court is authorized to defer action in the instant case until the Supreme Court has announced its decision in the above-cited case in which it has granted certiorari. No costs are taxed. The parties will bear their own costs on the present appeal.

ISSUED AS MANDATE: September 17, 1984

COSTS: NONE

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS

SCHEDULE OF COST TO AUDIT CENTRA, INCORPORATED FEBRUARY 4, 1980 THROUGH MARCH 28, 1980

Auditor	Number of Days Spent on Audit	Total Salary For Days Spent on Audit	Total Expenses Incurred During Audit	Total Cost of Audit (Salary plus Expenses)
R. Dziedic	5	$ 315.00	$ 272.70	$ 587.70
P. Priede	23	1,338.60	2,672.95	4,011.55
T. DeFranco	38	2,128.00	3,810.38	5,938.38
J. Pasia	25	1,655.00	3,607.28	5,262.28
J. Allegretti	5	291.00	512.85	803.85
J. Tolentino	5	280.00	446.54	726.54
A. Saleem	10	560.00	1,028.62	1,588.62
J. Leinbach	5	291.00	466.95	757.95
K. Geiken	25	1,455.00	2,326.50	3,781.50
D. Spenner	1	67.40	180.15	247.55
K. Muhr	5	280.00	438.36	718.36
TOTAL	147	$8,661.00	$15,763.28	$24,424.28

Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER L. STEVAS
CLERK

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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No. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

NOW COME Respondents, Central Transport, Inc., et al. pursuant to Rule 35.5 of the Rules of the Supreme Court of the United States and file this Supplemental Brief in support of their Brief on the Merits.

I. A UNANIMOUS PANEL OF THE SIXTH CIRCUIT COURT OF APPEALS CONSIDERED THE ISSUES OF THIS CASE AND REAFFIRMED ITS REASONING.

Judges Keith, Krupansky and Phillips recently considered a case with facts similar to those in *Central Transport* and adopted the holding in *Central Transport* as dispositive of the issue. *Central States Southeast and Southwest Areas Pension Fund* v. *R-W Service System, Inc.*,. No. 82-1899 (6th Cir., filed Aug. 23, 1984). (App. M.B. "G").

In addition to *Central Transport's* facts, the court was faced with the practical difficulty of demanding records that the employer had destroyed in its normal course of business. Since ERISA's fiduciary duty section became effective in 1975 and Taft-Hartley trustees have not been given audit power over non-covered employees, it is reasonable for a contributing employer to have destroyed the records the Funds now seek. To imply a power in the Funds not anticipated by the employer (or indeed asserted by the Funds at the time the records were compiled) may result in the anomaly that the Funds are entitled to audit records legitimately destroyed by the unsuspecting employer.

II. CONTRARY TO THE POSITION OF THE FUNDS THAT THEY WILL BE LIABLE TO UNDISCOVERED PARTICIPANTS WHO LATER APPLY FOR BENEFITS, THE HEALTH AND WELFARE TRUSTEES DISCLAIMED LIABILITY TO THEIR OWN PARTICIPANTS.

In a notice effective September 1, 1984, the Trustees of the Health and Welfare Plan advised participants that if their employer fails to make a contribution for their account, they will receive no benefit. (App.M.B. "H"). This is antithetical to Central States' position that a qualified employee is entitled to plan benefits even if the Funds fail to collect a contribution for his account. The Funds cannot complain to this Court that they may be liable to a participant despite a lack of contributions to his account and in the same breath advise the participants that failure of contribution results in a cut-off of benefits.

CONCLUSION

R-W Service adds another panel of judges to the unanimous opinion issued in *Central Transport* and exposes the practical problems of record retention that Congress can best address. The notice of the Health and Welfare Plan Trustees demonstrates clearly that the Trustees do not believe they are liable for benefits if an employer fails to make contributions.

Respectfully submitted,

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November 14, 1984

APPENDIX G

Not for Publication
No. 82-1899
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS HEALTH and WELFARE FUND, and JOHN E. DWYER,
Plaintiffs-Appellees,

v.

R-W SERVICE SYSTEM, INC.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed AUG 23, 1984

Before: KEITH and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

Per Curiam. R-W Service System, Inc. brings this interlocutory appeal from an order of the district court requiring it to make available to Plaintiffs certain records concerning all of its employees and other records it may have, or that are reasonably obtainable from third parties. For the reasons set forth below, we reverse the district court and remand for further proceedings not inconsistent with this opinion.

I

Plaintiffs-Appellees, the Central States Southeast and Southwest Areas Pension Fund, and Central States Southeast and Southwest Areas Health and Welfare Funds, (the Funds) are multiemployer-employee benefit trust funds established in accordance with Section 302 (c)(5) of the Labor

Management Relations Act of 1947, as amended. (29 U.S.C. §186(c) (5), LMRA). Both Funds are also subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*

Defendant-Appellant, R-W Service System, Inc. (R-W) is a trucking company, and a signatory to the National Master Freight Agreement and supplemental collective bargaining agreements with various local unions. The collective bargaining agreements require that R-W make payments to the Funds on behalf of employees covered by the collective bargaining agreement. ("Covered" employees). An employee is covered by the collective bargaining agreements if engaged in a job classification described in the Master Freight agreement or supplements. During all relevant times the collective bargaining agreements required specified weekly contributions on behalf of employees in the enumerated job classifications.

In 1978 Plaintiffs brought suit on behalf of their participants and beneficiaries to collect delinquent contributions, to compel R-W to produce certain records, and submit to an audit. The district court assumed jurisdiction under § 301 of the LMRA and § 502 of ERISA. Plaintiffs filed a motion for partial summary judgment to compel Defendant to provide various records and to submit to an audit.

At issue in the present appeal is an order of the district court of November 2, 1982 compelling defendant to "make personnel files and payroll data for *all* employees available to Plaintiffs." (emphasis in original). In addition, the district court ordered R-W to provide the Funds "with all records that it presently maintains, as set forth in the Magistrate's Report and Recommendation . . . [and] with all records to the extent that they are reasonable [*sic*] obtainable from third parties."[1]

[1] As set forth in the Magistrate's Report, the records subject to production included, *inter alia*, time cards or driver's logs, trip manifests, dispatch sheets, delivery receipts, bills of lading, freight bills, 941 F.I.C.A. Quarterly Returns.

Appendix G

II

In concluding Plaintiffs were entitled to have access to personnel and payroll records for *all* employees of R-W, the district judge was guided by another opinion from the same district in a similar case, reaching the same conclusion. *Central States, et al. v. Central Transport*, 522 F.Supp. 658 (E.D. Mich. 1981). However, subsequent to the filing of the notice of appeal in the case at bar (but before filing of briefs) this Court reversed the district court in *Central Transport* in a well reasoned opinion authored by Judge Kennedy. *Central States, et al. v. Central Transport*, 698 F.2d 802 (6th Cir. 1983) *petition for cert.* granted, 52 U.S.L.W. 3902 (June 18, 1984). R-W contends that the decision of the district court in the case at bar must be reversed in light of this Court's decision in *Central Transport*. Plaintiffs seek to distinguish *Central Transport*. We are of the opinion that this Court's opinion in *Central Transport, supra*, 698 F.2d 802 is dispositive in the case at bar with respect to the authority of Plaintiffs to examine records of noncovered employees. In *Central Transport* this Court held that a trustee does not have a statutory or contractual right under ERISA or the trust agreement to audit records of all employees of the defendants' employees. 698 F.2d at 810. Under *Central Transport*, a trustee has the authority to inspect the employer's books and records "if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement" but has not been classified as a covered employee. 698 F.2d at 810. (emphasis in original).

Plaintiffs have not suggested they have "reasonable cause" to believe that any *particular employee* is covered by collective bargaining but is not classified as a covered employee. The language of *Central Transport* is clear and Plaintiffs' attempts to distinguish the case are simply without merit. Accordingly, the decision of the district court must be reversed to the extent that it is inconsistent with the decision of this Court in *Central Transport*.

Appendix G

III

Defendant R-W also contends it has no obligation to produce records from third parties as is required by the order of the district court.

The district court stated:

> This Court also recognizes the anomaly that, although Plaintiffs are entitled to an audit from 1969-76, Defendant denies having possession of any records which date back that far. For this reason, the Court directs Defendant to provide Plaintiffs with records that are within its actual possession, as well as those records which are within its contructive possession (to wit, third parties).

The order further provided, "Defendant will provide Plaintiffs with all records to the extent that they are reasonably obtainable from third parties."

The production of these records is for the purposes of enabling Plaintiffs to conduct the audit of R-W.

Federal Rule of Civil Procedure 34 provides that a party may request any other party to produce relevant documents "which are in the possession, custody or control of the party upon whom the request is served." "A party may not be compelled to produce papers or things which are not in his possession, custody, or control . . ." 4A J.Moore, *Moore's Federal Practice* ¶ 34.17 (2d ed. 1983 revision), (footnote omitted). 8 Wright & Miller, *Federal Practice & Procedure*, § 2210 (1970). "Inspection can be had if the party to whom the request is made has the legal right to obtain the document, even though in fact he has no copy." *Id.* (footnote omitted).

The district court's order construes those documents within the possession of third parties as within the "constructive possession" of R-W. The court does not address the possession, custody, or control question in particular,

with respect to each of the documents sought by Plaintiffs' from third parties. It is appropriate for the district court on remand to consider, on a case by case basis, whether the documents sought by Plaintiffs are subject to production by the Defendant, and to consider any contentions of Defendant that it has no obligation to produce particular documents. For this Court to address on a document by document basis this issue at this point in the proceedings is at best premature as these contentions have yet to be addressed by the district court.

IV

In accordance with the foregoing, the decision of the district court ordering the production of all of employees' records is reversed in light of this Court's decision in *Central States, et al v. Central Transport*, 698 F.2d 802 (6th Cir. 1983), and the case is remanded to the district court for further proceedings. The district court is authorized to defer action in the instant case until the Supreme Court has announced its decision in the above-cited case in which it has granted certiorari. No costs are taxed. The parties will bear their own costs on the present appeal.

APPENDIX H

**CENTRAL STATES
SOUTHEAST AND SOUTHWEST AREAS
HEALTH AND WELFARE FUND**

**1984 - SPECIAL BULLETIN - 84-8
HEALTH AND WELFARE FUND**

DATE: JULY, 1984

TO: ALL PARTICIPANTS, LOCAL UNIONS REPRESENTING PARTICIPANTS, AND CONTRIBUTING EMPLOYERS OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND

In order to better protect the Fund's financial integrity and its participants, the Trustees have revised the Fund's suspension of benefits policy and procedures. Commencing September 1, 1984, participants employed by an employer that is delinquent in its payment of required contributions to the Fund will be notified of their employer's delinquency on a monthly basis. The notification will also inform the participants that, if their employer does not pay the delinquent amount within thirty (30) days after the date of the notice, the Fund will suspend the processing of claims incurred by such participants and their covered family members after the 30-day notice period expires. If the employer does not pay the delinquent contributions within that 30-day notice period, claims filed for services or other benefits provided or other losses incurred after the 30-day notice period, will not be processed unless and until the required contributions have been received by the Fund.

Participants are encouraged to continue to submit their claims to the Fund while their employer is delinquent in making the required contribution payments even though the processing of such claims will be suspended until the Fund

receives the delinquent contributions. Once the employer has paid the required contributions, the Fund will process all eligible claims that were previously suspended for the period through which contributions have been received by the Fund.

Every month the Fund will send to each delinquent contributing employer a notice of its delinquent amount and will distribute to each local union a list of delinquent employers with which it has a contract requiring contributions.

If you have any questions regarding this policy, please contact the Participant Services Group at (800) 323-5000.

Sincerely,

BOARD OF TRUSTEES
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE FUND, by
(s) GEORGE W. LEHR
EXECUTIVE DIRECTOR

08047

Office - Supreme Court, U.S.
FILED
MAY 22 1984
ALEXANDER L. STEVAS.

No. 82-2157

In the Supreme Court of the United States

OCTOBER TERM, 1983

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., PETITIONERS

v.

CENTRAL TRANSPORT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BEST AVAILABLE COPY

25 pp

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, permits the trustees of a multiemployer employee benefit plan to audit records of an employer participating in the plan to verify that the employer is making contributions on behalf of all employees for whom they are due.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2157

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., PETITIONERS

v.

CENTRAL TRANSPORT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are multiemployer employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Multiemployer Act), 29 U.S.C. 1001 *et seq.* Petitioners provide health, welfare and pension benefits to certain persons whose employers are engaged in interstate trucking. Respondents are 16 interstate trucking companies. Each of the petitioner benefit plans was created by a trust agreement entered into by multiemployer associations to which respondents belong and various local affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1] By the terms of the

[1] The trust agreements covering the pension fund and the health and welfare fund are identical in all material respects. References hereinafter are to the provisions of the Pension Fund trust agreement, which is reproduced at Pet. App. A43-A49.

National Master Freight Agreement, a collective bargaining agreement to which the union and respondents are signatories, respondents are required to make weekly contributions to petitioners for each employee "covered by the agreement." An employee is "covered," irrespective of union membership, if he or she is employed in a particular job classification described in the collective bargaining agreement.[2] Respondents have expressly agreed to be bound by the trust agreements governing the petitioner funds. Pet. App. A1-A5, A16.

The trust agreements require each participating employer to make "continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement" (Art. III, Sec. 1 (Pet. App. A44)). The agreements establish boards of trustees to administer the Funds and require the trustees "to demand and collect the contributions of the Employers to the Fund" and to "take such steps, including the institution and prosecution of * * * any legal proceedings as the[y] * * * in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of [employer] contributions * * * owed to the Trust Fund" (Art. III, Sec. 4 (Pet. App. A45)). In order to facilitate the trustees' performance of their collection and enforcement responsibilities, Article III, Section 5 of the trust agreements provides (Pet. App. A46):

> Each Employer shall promptly furnish to the Trustees, upon reasonable demand the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files * * *.

In addition, each employer is required to supply (*ibid.*):

> such other information as the Trustees may reasonably require in connection with the administration of the Trust.

---

[2] Respondents allege that 60% of their employees are not covered.

Article III, Section 5 provides as well that (*ibid.* (emphasis omitted)):

> The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.[3]

The trustees have the power to construe the provisions of the trust agreements; any construction adopted by the trustees in good faith is binding on employers, the union and employees (Art. IV, Sec. 17 (Pet. App. A27, A48)).[4] Finally, the trustees are empowered "[t]o do all acts, *whether or not expressly authorized herein*, which the Trustees may deem necessary or proper for the protection of the property held hereunder" (Art. IV, Sec. 14(e) (emphasis added) (Pet. App. A27, A45, A47)). See generally *Schneider Moving & Storage Co.* v. *Robbins*, No. 82-1860 (Apr. 18, 1984), slip op. 4-5.[5]

2. In late 1979, petitioners contacted respondents to arrange a "periodic review[] of participating employer contributions for the benefit of Plan Participants and their Beneficiaries," including a "[d]etermination of eligible Plan Participants covered by Collective Bargaining Agreements" (Pet. App. A6-A7). During the course of this audit, in February and March 1980, respondents furnished petitioners' audit staff with some of the information they requested. Respondents provided payroll registers for those employees whom respondents deemed cov-

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[3] Employee information disclosed to the trustees is required to be held in confidence except where disclosure is authorized by a court, required by law, or necessary to determine benefits due (Art. III, Sec. 5 (Pet. App. A46)).

[4] By the terms of the collective bargaining agreement and implementing agreements providing for respondents' participation in the Pension and Health and Welfare Funds, respondents agreed to be bound by all actions of the Funds' trustees (Pet. App. A3-A4).

[5] The trust agreements involved in this case are the same ones interpreted by the Court in *Schneider Moving & Storage Co.*

ered by the collective bargaining agreement. In addition, respondents produced insurance exception listings, which are documents prepared monthly that list the individuals and time periods for which respondents acknowledge liability to make contributions to the Trust Funds. *Id.* at A85-A86.

Based on the limited information provided, the Funds' auditors discovered substantial reporting and contribution deficiencies, including respondents' failure to pay sums owed to the Funds totalling in excess of $268,000.[6] The auditors also discovered four instances in which respondents had made contributions for an individual not listed on the various documents that purportedly contained the names of all covered employees. Pet. App. A7, A83-A84, A87. Despite petitioners' request, however, respondents refused to provide tax forms and complete payroll ledgers that included information regarding employees who respondents claimed were not covered (*id.* at A7, A86). At respondents' direction, the auditors left respondents' premises on March 28, 1980 without completing their audit (*id.* at A7, A88).

3. Petitioners commenced this action in the United States District Court for the Eastern District of Michigan pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a), and Section 502 of ERISA, 29 U.S.C. 1132, alleging that respondents had failed accurately to report, and to remit benefit fund contributions for, all employees covered by the collective bargaining agreement (Pet. App. A1-A2). The relief sought included an injunction directing respondents to allow a complete audit of their payroll records in order to enable the trustees to verify that respondents had correctly reported and made contributions in respect of all covered employees. Petitioners maintained that, without

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[6] Petitioners' auditors found that respondents had failed promptly to report newly-hired employees, had reported premature termination dates for departing employees, had failed to contribute for employees who worked part of a week during a strike, and had failed to contribute for employees who were on sick leave (Pet. App. A83).

such an independent audit, they would be unable to insure the financial integrity of the benefit funds or to fulfill their fiduciary obligations to the plans' participants and their beneficiaries. Pet. App. A2. The district court held (*id.* at A8-A14) that petitioners had both a contractual right under various provisions of the trust agreements and a statutory obligation under ERISA to audit respondents' payroll records "to independently verify the status and duties of all individuals employed by [respondents] in order to insure that proper benefit contribution payments are being made" (*id.* at A3).

4. The court of appeals reversed (Pet. App. A15-A34). The court initially held (*id.* at A18-A20) that ERISA does not itself afford petitioners any authority to audit respondents' records "to independently verify whether any given employee is covered by the collective bargaining agreements" (*id.* at A19). The court of appeals acknowledged that ERISA imposes broad fiduciary duties on benefit plan trustees. 29 U.S.C. 1104. The court reasoned, however, that because the Act also specifies that fiduciaries must act "solely in the interest of [plan] participants and beneficiaries," and must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" the Act (Pet. App. A19 (quoting 29 U.S.C. 1104(a)(1)), the

> provisions of ERISA require reference to the terms of the collective bargaining agreements and the trust agreements to determine who are the participants and beneficiaries to whom statutorily imposed duties are owed and to the terms of the trust agreements to determine what the precise nature of those duties are.

Pet. App. A19-A20.

The court of appeals held, moreover, that the trust agreements did not authorize the trustees to undertake the audit contemplated, either. The court of appeals initially concluded that the trustees' right under Article III,

Section 5 to demand pertinent information on *employees* did not extend to persons other than those covered by the benefit plans (Pet. App. A20-A26). Additional language in Article III, Section 5, that requires an employer to furnish other information reasonably required by the trustees, and to produce pertinent records for the trustees' examination, was also dismissed as insufficient to afford the trustees the audit authority claimed (Pet. App. A26). The court reasoned that this language " 'can only refer to information reasonably required as to "covered" employees additional to the records specifically listed' " (*ibid.*, quoting *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616, 619 (8th Cir. 1981)).

The court of appeals did recognize a contractual basis for the trustees' exercise of a tightly circumscribed auditing authority extending beyond records on persons conceded by an employer to be covered by the employee benefit plan (Pet. App. A27-A31). The court inferred that the trustees' duty to collect contributions owed by employers (see Art. IV, Sec. 2 (Pet. App. A47)) and their power to protect trust assets by taking acts not otherwise explicitly authorized (see Art. IV, Sec. 14(e) (Pet. App. A47)) required the trustees to "ensure that contributions to the Funds correlate with the disbursement of benefits from them" (*id.* at A29). But the right recognized was "confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been * * * classified * * * as a covered employee" (*ibid.*).

The court of appeals explained that the trustees' authority under the trust agreements is "limited * * * by ERISA" (Pet. App. A27). The court extracted this limiting principle in part from the trustees' statutory duties to administer the Funds exclusively in the interest of participants and other beneficiaries (*id.* at A29). The court of appeals appears, however, to have relied primarily upon the view that it would be "arbitrary and

capricious"—and thus an imprudent expenditure of plan assets inconsistent with a fiduciary's obligations under ERISA—to undertake an audit designed to ferret out underpayments, absent reasonable cause to suspect that an employer has failed to make required payments in the case of a particular employee (*id.* at A29-A30).[7]

Applying the limited auditing right it recognized, the court of appeals concluded that petitioners were entitled to review only respondents' records covering the four individuals as to whom respondents had made trust fund contributions without listing the individuals as covered (along with the records covering those employees respondents conceded to be covered). Any broader audit was deemed "outside of [the trustees'] statutorily and contractually imposed duties, express or implied, as a matter of law" (Pet. App. A32).

DISCUSSION

The decision of the court of appeals erroneously infers from the Employee Retirement Income Security Act of 1974 a limiting principle that will substantially restrict the ability of employee benefit plan trustees to fulfill their fiduciary duty to assure that all sums owed to such plans are properly remitted. The decision below also assigns a cramped interpretation to Article III, Section 5 of the trust agreements that is directly contrary to the reading that this Court recently gave to the same language in these agreements in *Schneider Moving & Storage Co.* v.

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[7] The court of appeals also concluded that limiting the trustees' auditing authority to instances in which there is cause to believe that required contributions have not been made for an identified employee was consistent with traditional labor relations principles (Pet. App. A30-A31). The court observed that "[c]overage under the terms of a collective bargaining agreement has traditionally been within the province of the employer and union" (*id.* at A30). The court of appeals believed that limiting the trustees' audit authority "preserves the privacy [*sic*] and integrity of the grievance and arbitration provisions agreed to by [respondents] and the Union as a means of resolving questions of employee coverage" (*id.* at A31).

Robbins, No. 82-1860 (Apr. 18, 1984). Because of the practical importance of the issues presented and the broad adverse consequences likely to flow from the decision below, we believe that further review is warranted. Because the court of appeals did not have the benefit of this Court's decision in *Schneider Moving & Storage Co.*, however, the Court may prefer to vacate the judgment of the court of appeals and remand this case for reconsideration in light of that decision.

1. a. After 10 years of study of the operation and failings of private employee pension and welfare benefit plans, Congress enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* ERISA was designed to redress major deficiencies in plan functioning found to implicate "the continued well-being and security of millions of employees and their dependents" by establishing "minimum standards * * * assuring the equitable character of such plans and their financial soundness" (29 U.S.C. 1001(a)). Congress's objective was simply to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). To achieve this end Congress required that "all assets of an employee benefit plan shall be held in trust" (29 U.S.C. 1103(a)). See S. Rep. 93-127, 93d Cong., 1st Sess. 29-30 (1973). In order "to make as certain as possible that pension fund assets would be adequate" to pay benefits due, Congress also "prescribed standards of conduct for plan" fiduciaries. *Nachman Corp.*, 446 U.S. at 375.

The fundamental standards of conduct prescribed by Congress are set forth in Section 404 of ERISA, 29 U.S.C. 1104. Congress required employee benefit plan fiduciaries to discharge their duties with respect to the plan "solely in the interest of the participants and beneficiaries" and with the "care, skill, prudence, and diligence" that a prudent person "familiar with such mat-

ters" would employ if acting under similar circumstances. 29 U.S.C. 1104(a)(1). Congress also required fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as [they] are consistent with [ERISA]." 29 U.S.C. 1104 (a)(1)(D).

In outlining the fiduciaries' responsibilities, Congress deliberately declined to enumerate the powers and duties of trustees, choosing instead to invoke the common law of trusts: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts" (S. Rep. 93-127, *supra*, at 29). See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332-333 (1981). It was Congress's intent that principles of fiduciary conduct adopted from existing trust law be interpreted and applied "bearing in mind the special nature and purpose of employee benefit plans." H.R. Rep. 93-1280, 93d Cong., 2d Sess. 302 (1974). Thus, the trustees' statutory obligations to act in a prudent manner and with utmost fidelity to the interests of participants and beneficiaries encompass many subsidiary duties and powers recognized in the common law.

Specifically, the law of trusts recognizes a number of fiduciary duties that necessarily arise from the trust relationship. Trustees have a common law duty to take necessary steps to preserve and maintain trust assets. Bogert, *Trusts and Trustees* § 582 (rev. 2d ed. 1980). Acts traditionally deemed necessary to preserve trust assets include identifying the trust assets, holding the settlor to his obligation to deliver the assets, and asserting control over the assets. *Id.* § 583, at 348-350, 355-356. Trustees also have a duty to investigate the identity of beneficiaries for the purpose of notifying them of gifts made for their benefit. *Id.* § 583, at 348; see *Rosen* v. *Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir.), cert. denied, 454 U.S. 989 (1981).

Moreover, under the law of trusts made applicable to employee benefit plans by ERISA, a fiduciary's express

powers, defined by the instrument creating the trust, are augmented by powers implied from the terms and purposes of the trust. Bogert, *supra*, § 551, at 3, 41. Among those implied powers is the trustee's authority to "use the ordinary and natural means" for obtaining a result dictated by the settlor. *Id.* § 551, at 41; *Restatement (Second) of Trusts* § 186 (1959).

b. An audit of a participating employer's payroll records is an ordinary and natural means for employee benefit plan trustees to fulfill their statutory duty to act with fidelity to the interests of plan participants and beneficiaries and their common law duties to collect the trust assets and identify the beneficiaries. Plainly the trustees of an employee benefit plan have an obligation to safeguard the interests of unidentified, but covered, employees for whom no contributions are being made. In addition, in a multiemployer plan, the trustees must protect the interests of all participants and employers by guarding against underfunding resulting from deficiencies in the contributions of any particular employer. In order to carry out these duties in a manner consistent with the statutory standard of prudence, trustees must develop effective strategies for determining whether employers' contributions make provision for all "covered" employees. Thus, trustees must develop "reasonable, diligent and systematic methods for the review of employer contribution accounts [including] field audits." Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976). Accord, *Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 E.B.C. 1726, 1732 (D.D.C. 1982).

Contrary to the view of the court of appeals (Pet. App. A19, A29), checking an employer's records to verify that required contributions have been made for all covered employees, whether or not identified as such by the employer, is entirely consistent with the statutory directive that fiduciaries act solely in the interest of plan participants and beneficiaries. Such an audit necessarily encompasses review of payroll records of persons who

are not acknowledged by the employer to be covered, and will as a practical matter often entail examination of records of some persons who are not in fact covered. Still, the essential purpose of such an audit is to protect the interests of plan participants—both those who have erroneously been excluded by the employer in making contributions, and those who have been accurately identified as covered but whose interests are threatened by underfunding of the plan because of an employer's failure to make contributions in respect of all covered persons.

Equally incorrect is the court of appeals' categorical judgment (Pet. App. A29-A30) that a prudent fiduciary is prohibited from undertaking an audit extending beyond the records of those conceded to be covered and those other identifiable individuals the trustees have reasonable cause to believe are covered. This limitation deprives the trustees' auditing authority of the ability to uncover previously unsuspected delinquencies in contributions. It would reward concealment of such delinquencies and would, contrary to fundamental precepts of fiduciary responsibility, force trustees to rely heavily upon the probity and accuracy of determinations made by contributing employers. Cf. 29 U.S.C. 1110. The court of appeals' decision thus is irreconcilable with Congress's desire to employ the common law of trusts "to make as certain as possible that pension fund assets would be adequate" to pay benefits due (*Nachman Corp.*, 446 U.S. at 375). It constrains plan trustees from employing reasonable means that are well-suited and necessary to the performance of their fiduciary duties.[8]

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[8] Generally accepted accounting standards confirm that trustees of a multiemployer employee benefit plan are not to be restricted in the performance of their obligation to identify and collect all assets owed to the plan. See generally Arthur Young & Co. Am. Br. 8-12. For instance, completion of an independent audit of such a benefit plan requires that the auditor be assured of the accuracy of data on the number and identity of participants, and may require that an employer's records be examined to enable the

The tension between the critical role that Congress expected plan fiduciaries to play in assuring the financial soundness of benefit plans and the restricted scope of the auditing authority recognized by the court of appeals is exacerbated by the court's niggardly application of the "reasonable cause" standard it announced (see pages 6-7, *supra*). Surely, when an audit limited to payroll records of concededly covered employees uncovers significant employer contribution deficiencies, prudence dictates that further auditing be undertaken to verify whether contributions are being made for all covered employees. Even if particularized suspicion were required, petitioners' trustees had ample reason to investigate further here. The court of appeals' conclusion that ERISA precludes the fund trustees from undertaking the necessary investigation is clearly erroneous.

c. The conclusion that Congress expected employee benefit plan trustees to be able to audit employer records

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auditor to verify the employer's determination of covered persons. American Institute of Certified Public Accountants (AICPA), *Audits of Employee Benefit Plans* §§ 8.4, 10.6 (1983); AICPA, *Audits of Employee Health and Welfare Benefit Funds* 20-21 (1972). These professional auditing procedures reflect an elementary—but critical—auditing principle:

> The auditor should determine that the population [examined] is appropriate for the specific audit objective. For example, an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.

AICPA, *Statement on Auditing Standards No. 39* ¶ 17 (1981).

The court of appeals' suggestion (Pet. App. A29-A30) that petitioners' proposed audit would prove unacceptably expensive is unfounded. Under generally accepted auditing standards, auditors would restrict their initial investigation to a small statistical sample of the total universe of employees. A more extensive sample would be employed only if the initial audit revealed significant problems with the employer's reporting. See AICPA, *Audits of Employee Benefit Plans* §§ 10.5, 10.6. The court of appeals also overlooked the enhancement of plan assets that typically results from meticulous enforcement of employer contribution requirements.

to verify the accuracy of employer identification of covered employees is supported by more narrowly focused provisions of ERISA, as well as by the general fiduciary responsibility section, 29 U.S.C. 1104. For instance, under 29 U.S.C. 1023(c)(1), the annual report required to be filed by the plan administrator with the Secretary of Labor must reflect the number of employees covered by the plan. Congress must have understood that the administrator would have access to the information necessary to determine that figure reliably and independently.

29 U.S.C. 1059 also indicates that such information would be open to the plan fiduciaries. Under Section 1059(a)(1) and (2), an employer participating in a multiemployer plan is required to "furnish to the plan administrator the information necessary for the administrator to maintain" records "with respect to *each* * * * employee[] sufficient to determine the benefits due or which may become due to such employee[]" (emphasis added).[9] Such records plainly would not meet the statutory requirement if limited to persons an employer concedes to be covered. Moreover, Section 1059(a)(1) requires each employer to "furnish to the plan administrator the information necessary" to enable the administrator to render a report "to each employee who is a participant under the plan" stating the extent of his accrued benefits thereunder, whenever such a report is requested or in certain other circumstances. Like Section 1023(c)(1), Section 1059 necessarily assumes that plan fiduciaries will have access to information necessary to enable them correctly to determine the identity of plan participants.

The same is true of 29 U.S.C. 1023(a)(3)(A), which requires that the annual reports of employee benefit plans include the opinion of an independent public accountant as to whether the financial statements required to be contained in the report are presented "in conformity with

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[9] Under ERISA the term "employee" includes all persons employed by the employer. 29 U.S.C. 1002(6).

generally accepted accounting principles." To provide a foundation for rendering an opinion, the independent auditor is to undertake "such tests of the books and records of the plan as are considered necessary" under "generally accepted auditing standards" (*ibid.*). As explained in detail in the amicus curiae brief of Arthur Young & Co. (see also pages 11-12 note 8, *supra*), at least in the case of an audit of a multiemployer fund, generally accepted accounting standards require that employer records be available to confirm the accuracy of coverage determinations and plan funding. More significantly, perhaps, these standards were developed prior to the enactment of ERISA. Thus, Congress must have expected that employer records would be available for independent audit. Because the sufficiency of a plan's internal auditing procedures is an important consideration in its own right in the independent auditor's assessment of the plan's financial statement, Section 1023(a)(3)(A) undercuts the court of appeals' view that Congress did not sanction trustees' exercise of auditing authority with respect to each employer's records.

2. a. Based on the foregoing considerations, we conclude that Congress contemplated that employee benefit plan trustees would have the authority to verify the sufficiency of employer contributions. But even if there were doubt as to whether ERISA itself should be read to *confer* authority upon benefit plan trustees to undertake such audits, the court of appeals' view that provisions of ERISA should be read to *limit* the contractual grant of authority contained in the trust agreements in this case would be wholly untenable. As we have indicated above, verification of an employer's coverage determinations is not inconsistent with either the prudent person standard of care or the statutory requirement of fidelity to the interests of covered persons. In our view, ERISA requires at a minimum that the provisions of a trust agreement that authorize trustees to enforce the contribution obligations of the employer be given a liberal, common-

sense interpretation that will enable the trustees to fulfill their role as guardians of all participants' interests.[10]

b. Examination of the access-to-records provisions of the trust agreement, Article III, Section 5 (see pages 2-3, *supra*), makes clear that the trustees are not limited to examination of records of employees either who are acknowledged by the employer to be covered or who the trustees have reasonable cause to believe have been erroneously excluded. The trust agreement expressly requires the employer to provide the trustees not only with records on covered employees, but also with any other information reasonably required and any pertinent records deemed necessary by the trustees for the proper administration of the trust. In light of the breadth and the structure of the statutory language, and the fact that uncertainty and disputes as to coverage of particular individuals are a fixture of pension plan operation, this language can only be fairly read to authorize the trustees to review employer documents necessary to confirm independently that all contributions due have been made.

In *Schneider Moving & Storage Co.*, the Court read Article III, Section 5 in precisely this manner (slip op. 5 (footnote omitted)):

> To ensure compliance with the contribution requirements, the trust agreements gave the trustees the authority to examine [the employers'] payroll records. If the trustees determined that [the employers] were not complying with their contribution requirements, they had the authority under the trust agreements to initiate legal proceedings to enforce those requirements * * *.[11]

The Court thus indicated that, contrary to the view of the court of appeals in this case, the trustees' audit au-

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[10] The court of appeals' use of ERISA to narrow the authority contractually granted to petitioners' trustees is difficult to reconcile with its own reasoning (see page 5, *supra*) that ERISA looks to the trust agreement to spell out a fiduciary's powers and that ERISA itself accordingly confers no auditing authority on trustees.

[11] See page 3 note 5, *supra*.

thority is available for the purpose of *uncovering* an employer's failure to make required contributions, and not merely to confirm suspected delinquencies.[12]

The court of appeals' decision conflicts with *Schneider Moving & Storage Co.* in another significant respect as well. Contrary to the court of appeals' analysis (see page 7 note 7, *supra*), this Court squarely rejected the premise that petitioners' trustees are obliged to rely upon the union or the arbitration mechanism provided in the collective bargaining agreement to enforce the contribution obligations of participating employers. Slip op. 8-12. To be sure, the court of appeals did not completely subordinate the trustees' enforcement responsibilities to the labor-management arbitral process here. But the court's reasoning that the auditing rights of trustees should be limited so as to defer to that process (see Pet. App. A30-A31) is inconsistent with this Court's recognition (slip op. 11) that the interests of the trustees and the union are not congruent.[13] In any event, the effect

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[12] If auditing authority is limited to suspected delinquencies it does relatively little to complement and support the trustees' acknowledged authority to enforce contribution requirements through legal proceedings. A similar consideration reinforces our statutory analysis. Under 29 U.S.C. 1132 plan fiduciaries are authorized to bring suit to collect delinquent contributions, and may also seek "such * * * equitable relief as the court deems appropriate." Certainly when the trustees have reasonable cause to suspect delinquencies they may file an action under this provision and the district court may direct that an audit be completed. But litigation to collect delinquent contributions may not be commenced without cause to believe that there is "good ground to support it." Fed. R. Civ. P. 11; see *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 24 n.12 (Burger, C.J., dissenting). Section 1132 effectively presumes that plan fiduciaries have means to discover delinquencies that will enable them to avail themselves of an enforcement action.

[13] This Court also recognized in *Schneider Moving & Storage Co.* (slip op. 9) that, in the case of a multiemployer fund, the trustees' exacting enforcement of contribution requirements against each particular employer serves the interests of every other participating employer as well as those of covered employees.

of limiting trustees' authority to cases where a concrete controversy exists as to the coverage of an identified employee is quixotic. So confined, the trustees' audit authority affords no protection to their distinctive interest in uncovering unsuspected delinquencies, while it tends to duplicate the union's role in resolving identified controversies as to particular employees.

3. Further review of the decision in this case is warranted because of the substantial deleterious impact it is likely to have upon administration of employee benefit trust funds and the substantial uncertainty created for fiduciaries as to the scope of their obligations. As indicated above, the decision of the court of appeals sharply restricts the tools available to employee benefit plan fiduciaries to carry out their vital responsibilities. Congress has found that the effective performance of these responsibilities is essential to the "continued well-being and security of millions of employees" (29 U.S.C. 1001 (a); see also 29 U.S.C. 1001a(a)(3)).[14] Moreover, employer delinquencies pose an especially difficult problem for multiemployer pension and benefit funds. See, *e.g.*, 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson). Because of the fluid structure of employment in many industries in which multiemployer benefit plans are typically found, the trustees of such plans have a particularly compelling need for independent means to vertify employers' coverage and contribution determinations. See Bricklayers Fringe Benefit Funds Am. Br. 4-5.

The decision below will exacerbate the fiscal problems that affect multiemployer plans because of employer contribution delinquencies by hindering trustees' efforts to assure that such plans receive all contributions due. Contributing employers, through inadvertence, mistaken legal interpretation or fraud, do not always remit accurate contributions on behalf of all participants. See, *e.g.*, *Jim*

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[14] Approximately half a million persons are participants in or beneficiaries of the petitioner trust funds. *Schneider Moving & Storage Co.*, slip op. 9 n.16.

McNeff, Inc. v. *Todd*, No. 81-2150 (Apr. 27, 1983); *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), petition for cert. pending, No. 83-421; *United States* v. *S & Vee Cartage Co.*, 704 F.2d 914 (6th Cir. 1983), cert. denied, No. 83-228 (Oct. 31, 1983). Nevertheless, pension plans must pay benefits to eligible participants and beneficiaries whether or not the employer has made required contributions to the plan on behalf of the particular employees. *Van Gunten* v. *Central States*, 672 F.2d 586, 589 (6th Cir. 1982); Department of Labor Advisory Opinion No. 76-89 (Aug. 31, 1976) (Pet. App. A70-A71).[15] Accordingly, undetected contribution deficiencies, however caused, can result in underfunding of plans and threaten the interests of those who depend on them.[16]

The decided cases confirm that general payroll audits can facilitate recovery of significant contribution delinquencies undetectable by any other means. See, *e.g.*, *Jim McNeff, Inc.* v. *Todd*, *supra* (audit revealed that employer owed more than $5,000 on behalf of five employees that employer had never reported as covered); *Laborers Health & Welfare Trust Fund* v. *Kaufman & Broad of Northern California, Inc.*, 707 F.2d 412 (9th Cir. 1983) (audit indicated a discrepancy exceeding $130,000 due to

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[15] We know of no support for the court of appeals' speculation (Pet. App. A33-A34) that a covered employee on whose behalf no contributions were made might be estopped from claiming benefits from a plan.

[16] Under Title IV of ERISA, 29 U.S.C. 1301 *et seq.*, Congress created the Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation, to administer a program of insurance to guaranty the payment of certain pension benefits to participants in failed pension plans. Under ERISA and the Multiemployer Pension Plan Amendments of 1980, the program of guarantees was applied in stages to multiemployer pension plans. The court of appeals' decision undermining the efficacy of fiduciary mechanisms for assuring that all required employer contributions are made has the potential to place an added financial burden upon the PBGC insurance program and to impose additional administrative burdens upon the agency. The PBGC has authorized us to report that it concurs in the view that further review is warranted in this case.

controversy regarding covered or uncovered status of particular nonunion labor); *Bugher* v. *Consolidated X-Ray Service Corp.*, *supra* (audit uncovered more than $100,000 due on behalf of covered employees who employer erroneously believed were not covered); *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981) (audit revealed deficiency of more than $25,000 due to employers' failure to contribute on behalf of nonunion covered employees).

The decision of the court of appeals, however, will encourage employer resistance to audits. Trustees who lack a clearly-enunciated right to audit general payroll records must depend on the employer voluntarily to provide the information needed to assure that contributions are being made for all eligible employees. The decision below thus will frustrate the efforts of plan trustees to fulfill their fiduciary duties, create confusion as to the extent of their obligations, and breed litigation. The decision may also discourage trustees from exercising the utmost diligence in protecting the interests of all persons entitled to benefits under employer benefit plans.[17]

Because of the broad adverse consequences of the court of appeals' decision, the judgment of the court of appeals should not stand unreviewed. Plenary consideration may be appropriate at this time. Because the court of appeals' analysis conflicts in several respects with *Schneider Moving & Storage Co.*, however, the Court may wish to consider vacating the judgment of the court of appeals and remanding the case for further proceedings in that court.[18]

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[17] The decision thus would place greater burdens on the Secretary of Labor, who is authorized to investigate "whether any person has violated or is about to violate" any provision of ERISA (29 U.S.C. 1134(a)). Congress surely did not intend that the Secretary's investigative authority be the exclusive instrument for verifying the completeness of employer contributions, for it expressly withheld from the Secretary authority to bring suit to collect delinquent employer contributions to a multiemployer plan. See 29 U.S.C. 1132(b)(2) and 1145.

[18] The court of appeals' decision on the contractual issue rested in part upon *Central States, Southeast & Southwest Areas Pension*

CONCLUSION

The petition for a writ of certiorari should be granted. In lieu of plenary consideration at this time, the Court may prefer to vacate the judgment of the court of appeals and remand the case for reconsideration in light of *Schneider Moving & Storage Co.*

Respectfully submitted.

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Fund v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981). See Pet. App. A26. Subsequent to the court of appeals' decision in this case, the Eighth Circuit, sitting en banc, rejected the premise of *CRST* that disputes as to whether an employee is covered under a benefit plan must be resolved through labor-management arbitration. *Robbins* v. *Prosser's Moving & Storage Co.*, 700 F.2d 433 (1983). This Court in turn affirmed that decision in *Schneider Moving & Storage Co., supra.* While the Eighth Circuit in *Robbins* did not expressly disavow its earlier ruling interpreting Article III, Section 5 of the trust agreement, its analysis suggests that it would not adhere to that view. See 700 F.2d at 442. We note that *Bugher* v. *Consolidated X-Ray Service Corp., supra*, which treats an employer's failure to cooperate with an audit as bad faith conduct warranting an award of attorney's fees (705 F.2d at 1436-1437), also appears to be inconsistent with the decision below.

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No. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., FOR LEAVE TO FILE BRIEF AMICI CURIAE

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*Reprinted in the appendix to this brief.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Bricklayers Fringe Benefit Funds — Metropolitan Area, the Carpenters Fringe Benefit Funds — Detroit and Vicinity, the Cement Masons Fringe Benefit Funds — Detroit and Vicinity, the Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW, and the Laborers Fringe Benefit Funds — Detroit and Vicinity move to intervene in this case as amici curiae for purposes of submitting the attached brief.[1]

[1]Movants had filed an *amicus brief* in support of the petition for writ of certiorari. It was necessary to file a motion for leave to file that brief because, although counsel for petitioners had consented to the filing, counsel for respondents had refused to give consent. Believing that the response of counsel for the latter would be identical if consent was sought for the filing of the attached brief, movants have not sought consent of any counsel.

The amici are composite names for trust funds[2] established under, and administered pursuant to, Section 302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001, *et seq.* In this respect, they have the same legal status as petitioners. Amici operate to provide pension, medical, hospitalization, dental, holiday and vacation pay, optical and other benefits to workers in the construction industry in southeastern Michigan. Each is a multi-employer, jointly administered employee benefit plan created by collective bargaining.

Amici believe that the Sixth Circuit's opinion of January 20, 1983, was, at the very least, overly broad and, by its sweep, will, unless corrected, do serious damage to the public policy favoring protection of employee benefit plans and to the statu-

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[2]The "Bricklayers Fringe Benefit Funds — Metropolitan Area" include the Bricklayers Pension Trust Fund — Metropolitan Area, the Bricklayers and Trowel Trades International Pension Fund, the Bricklayers Holiday Trust Fund — Metropolitan Area, the Detroit and Vicinity Trowel Trades Health and Welfare Fund, and the Bricklayers Joint Apprenticeship Committee.

The "Carpenters Fringe Benefit Funds — Detroit and Vicinity" include the Carpenters Pension Trust Fund — Detroit and Vicinity, the Carpenters Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Carpenters Health and Welfare Fund — Detroit and Vicinity.

The "Cement Masons Fringe Benefit Funds — Detroit and Vicinity" include the Cement Masons Pension Trust Fund — Detroit and Vicinity, the Bricklayers and Trowels Trades International Pension Fund, the Cement Masons Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Detroit and Vicinity Trowel Trades Health and Welfare Fund.

The "Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW" include the Electrical Workers Pension Trust Fund of Local Union #58, IBEW, the Electrical Workers Joint Board of Trustees Vacation Fund, the Electrical Workers Insurance Fund, the Supplemental Unemployment Benefit Funds of the Electrical Industry, Detroit, Michigan, the National Electrical Benefit Fund, and the Joint Apprenticeship Training Trust Fund.

The "Laborers Fringe Benefit Funds — Detroit and Vicinity" include the Laborers Pension Trust Fund — Detroit and Vicinity, the Laborers Vacation and Holiday Trust Fund — Detroit and Vicinity, and the Laborers Metropolitan Detroit Health and Welfare Fund.

tory requirement, in furtherance of that policy, that such plans be properly funded. There are critical policy and practical considerations which amici believe the Court of Appeals either failed to consider or misapprehended. In the interests of the participants for whose sole and exclusive benefit amici exist and the thousands of workers and beneficiaries similarly situated, amici request leave to file the attached brief.

Respectfully submitted,

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Dated: July 11, 1984.

No. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF BRICKLAYERS FRINGE BENEFIT FUNDS — METROPOLITAN AREA, ET AL., AMICI CURIAE

Amici, Bricklayers Fringe Benefit Funds — Metropolitan Area, Carpenters Fringe Benefit Funds — Detroit and Vicinity, Cement Masons Fringe Benefit Funds — Detroit and Vicinity, Electrical Workers Fringe Benefit Funds of Local Union #58, IBEW, and Laborers Fringe Benefit Funds — Detroit and Vicinity, are composite names[1] for various employee pension and welfare benefit plans covering workers in the construction industry in southeastern Michigan and, in many respects, their families. All were established under and are administered pursuant to Section 302 of the Labor-Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§1001, *et seq.*

[1]See note 2 in the (attached) Motion of Bricklayers Fringe Benefit Funds — Metropolitan Area, et al., for Leave to File Brief Amici Curiae. The interest of the amici is stated in the motion.

Amici have not made a detailed review of the trial court record in this case. Insofar as the decision of the Court of Appeals for the Sixth Circuit rested on the details of the documents submitted or the particular agreed-upon relationships among the parties, we have no comment to make. It is the breadth of the opinion which concerns us.[2] We are fearful that application of the principles set out there will frustrate our efforts to conform to the standards of diligence in collecting contributions imposed by statute and regulation.

This brief will be limited to a short discussion of the matters which, we believe, require reversal of the judgment of the court below, particularly in respect to industries like the construction industry.

1. As a prefatory comment to our discussion, it should be noted that, in reaching its conclusion, the panel drew heavily upon the Eighth Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund* v *CRST, Inc.*, 641 F.2d 616 (1981). After the Sixth Circuit's decision in the instant case, the Eighth Circuit, *en banc*, overruled the *CRST* holding. *Robbins* v *Prosser's Moving and Storage Company*, 700 F.2d 433 (Feb. 16, 1983).[3] The Eighth Circuit's *en banc* decision was in turn affirmed by this Court. *Schneider Moving & Storage Company* v *Robbins*, --- U.S. ---, 104 S.Ct. 1844, 80 L.Ed.2d 366 (April 18, 1984).

Although the narrow issue of the *Robbins* case was whether the trustees of benefit funds were required to exhaust arbitration

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[2]The Sixth Circuit's panel decision in the instant matter appears to be diametrically in conflict with another panel's (unreported) decision. See *Hughes* v *Baker Cement Contractors, Inc.*, C.A. 6, No. 81-3307 (July 6, 1982), reprinted in the appendix to this brief.

[3]The Eighth Circuit stated, "On reflection, however, we believe that [the cited cases including *CRST*] were not correctly decided." 700 F.2d, at 438. See also the entire discussion at p. 438 of the opinion. In the *Hughes* case, *supra*, note 2, involving a fact situation somewhat similar to the fact situation in this case, the Sixth Circuit panel which decided that case also declined to follow *CRST*.

provisions of a collective bargaining agreement before instituting a collection suit, many of the policy considerations involved in this case were discussed at some length in the Eighth Circuit's *en banc* opinion. In deciding *Robbins*, the Court took cognizance of the Sixth Circuit's opinion in the instant case. *Robbins*, 700 F.2d, at 445, n. 7 (dissenting opinion).

2. ERISA imposes a fiduciary duty upon trustees of employee benefit plans to collect contributions. One of the earliest interpretative statements concerning ERISA by the Department of Labor, one of the two agencies charged by the statute with enforcement in respect to continuing plans, dealt with this subject. While setting out the conditions under which trustees could agree to installment payment plans of overdue contributions from delinquent employers, the Department of Labor made it plain that such agreements were extensions of credit prohibited by ERISA and that trustees were required to make "systematic, reasonable and diligent efforts to collect delinquent contributions." Prohibited Transaction Exemption 76-1 (March 23, 1976), 41 FR 12740. One of the necessary elements of any systematic effort by multi-employer fringe benefit programs to collect amounts owing —which must, after all, be determined before they can be collected — is the audit.

Typically, multi-employer plans such as petitioners and amici depend upon a system of employer self-disclosure. Weekly or monthly, each employer fills out report forms setting out the names of the employees performing bargaining unit work, hours worked and/or wages earned and such other information as is required for the calculation of contributions due and for the administration of the fringe benefit program. The employer then calculates the contribution due (ordinarily, an amount equal to a percentage of wages or an amount multiplied by the number of hours, days or weeks worked or paid, depending upon the agreed-upon formula) and mails the completed form and a check for the amount shown to be due to the fund office or a depository bank.

The fund ordinarily has no method of independently verifying or challenging the amounts said by the employer to be due. All of the information is in the employer's possession. None is in the fund's.

The fund must, therefore, develop devices intended to disclose potential problem areas or to bring forward information from other sources (e.g., employees, former employees, unions, public information, other employers) which tends either to confirm or to question the information supplied by the employer. Ultimately, however, the proof must come from the employer's own records, which means by audit.[4]

3. For the audit to have any value, the auditor must have available to him all documents required to determine the accuracy of the fringe benefit contribution reports. No one employer record by itself is sufficient to allow the sort of crosschecking the auditor must engage in to make judgments about authenticity and completeness. For example, an employer may record payments to certain employees through the general disbursements book rather than payroll records, or the employer may be misclassifying employees or classifying certain employees as "independent contractors" to evade obligations under the tax laws and/or the collective bargaining agreement.[5] In such situations an audit confined to those records identified by the employer itself as "payroll records of affected employees" would be more likely to conceal than reveal the delinquency.

4. The difficulties are even greater in the kinds of industries which developed multiemployer benefit plans. Small employers

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[4] *See Jim McNeff, Inc. v. Todd*, — U.S. —, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983). In that case, it was an audit which disclosed that the employer owed several thousand dollars in trust fund contributions.

[5] In *Jim McNeff, Inc. v. Todd*, cited in note 4, *supra*, this Court noted that the employer had submitted reports to the funds containing "the false notation that 'no members of this craft were employed during this month.'" Had the funds in that case been limited in their audit procedures as the Sixth Circuit would limit petitioners in this case, the shortages would never have been found.

or a mixture of large and small employers sharing a pool of workers are characteristic of those industries: trucking, retail trades, garment, maritime, entertainment and construction. Multiemployer plans were created through collective bargaining to provide a means for workers in those industries and their families to achieve a measure of the health and retirement security which workers involved in large single employer plans already had.

Consider the relevant characteristics of the construction industry in which amici operate. Individual carpenters or cement finishers or laborers may work for one or dozens of employers each year. If there is a hiatus in available work at one jobsite because of supply or scheduling problems (not uncommon), the worker may find a short job on another jobsite for the same or a different employer or a different company of the same employer.

The fringe benefit funds will ordinarily have no way of knowing by whom a given participant worker is employed, or even if the worker is employed, until the employer contribution forms are received. The transient nature of employment in the industry[6] is another factor which leaves the funds at the mercy of employer probity and accuracy and requires broad access to records when audits are performed.[7]

5. All of this is further aggravated by the fact that the bene-

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[6]See part II of the opinion in *Jim McNeff, Inc. v Todd, supra.*

[7]Although the context of the case differs from the instant one, the following language from then District Judge Cornelia Kennedy's (unreported) opinion in *Laborers' Pension Trust Fund — Detroit and Vicinity, et al., v Frank Bizzocchi Cement Construction Company, Inc.*, U.S.D.C., E.D. Mich., Civ. #74-72450 (Oct. 29, 1975), applies here:

> "Many members of the laborers union work for several employers during a given year and work only portions of the year. Thus, the amounts received by any one employer may differ, making it impossible for the union or the funds to secure this information directly from members. Many laborers have limited education and unless they receive the vacation and holiday benefits through their union organization may not know whether they have received the correct amount or not." (Slip Opinion, at 3.)

fit funds are involuntary creditors and that the debt "has a unique aspect," in that "the party with the responsibility for collection of the debt does not have apparent ability to withhold credit." *Laborers' Fringe Benefit Funds — Detroit and Vicinity* v *Northwest Concrete & Construction, Inc.*, U.S.D.C., E.D. Mich., Civ. #78-71765 (June 25, 1979), rev'd on other grounds, 640 F.2d 1350 (C.A. 6, 1981). The trustees have nothing to do with the establishment of the basic contractual arrangement which obligates the employer. They cannot refuse to deal with an employer which has signed the requisite collective bargaining agreement even if they believe that employer to be financially irresponsible. To the extent that credit is extended, they have no voice in the terms of the extension and, unless the collective bargaining agreement or the applicable trust agreement specifically so provide, they cannot make a demand from a given employer for security to assure payment of the obligation, regardless of how impecunious the employer might be. Although the union may have some power to "police" the industry, and its power in the construction industry is often considerably exaggerated, the benefit funds have none.[8]

6. The opinion of the Court of Appeals suggests that there are solutions to some of these difficulties encountered by the trustees. With respect, we believe that the "solutions" are illusory.

A. Contrary to what the court stated, the union and the benefit funds do not necessarily have an identity of interests. One of the principal purposes of the Taft-Hartley requirement of joint union-management administration of such funds was to moderate the level of fund-union identity and ERISA has, of course, made it even clearer that trustees must act for the bene-

[8]Even the workers' collective bargaining agent, however, may not insist upon such security as part of a collective bargaining agreement. To do so is an unfair labor practice. *Local 164, Brotherhood of Painters* v *National Labor Relations Board*, 293 F.2d 133 (C.A.D.C., 1961); *Lathers Local 42 and Lathing Contractors Association of Southern California*, 223 NLRB 37 (1976).

fit of the participants, not the unions or the companies. See, e.g., *National Labor Relations Board* v *Amax Coal Company*, 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981), *Hughes* v *Baker Cement Contractors, Inc., supra*,[9] *Robbins*, 700 F.2d, at 439-442, and *Ambromovage* v *Thomas*, 3 EBC 1873, 1878, 1883-1886 (U.S.D.C., M.D., Pa., Civil #8796, July 9, 1982).

B. The "estoppel argument" for subsequently denying benefits to a worker whose employer has cheated, with or without the employee's connivance, can hardly justify the panel's conclusion. First, it is far from certain that this "defense" is available to the funds when an employee sues for benefits. See, e.g., *Robbins*, 700 F.2d, at 441. Thus, to use the Eighth Circuit's expression, the funds are "in danger of being whipsawed".[10] *Ibid.* Second, it fails to take into consideration the inequality of the distribution of power between employer and employee (particularly during hard times). The employer, in clear violation of the agreement, can force an employee as a condition of keeping his job not to complain about the employer's failure to make necessary contributions, a danger of great magnitude when the economy is in a state of recession or depression. Finally, it fails to take into consideration the fact that some employees are too uneducated, either generally or in the mechanisms by which their benefit funds operate, or too unsophisticated to know that they are being cheated.[11]

C. For practical purposes, the recoupment remedy suggested by the Sixth Circuit panel simply does not exist. By the time the cause will have accrued, there is a distinct possibility that the employer will no longer be in business or have sufficient

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[9]See note 2, *supra*.

[10]In his *amicus* brief in support of the petition for writ of certiorari, the Solicitor General said, "we know of no support for the [Sixth Circuit's] speculation (Pet. App. A33-A34) that a covered employee on whose behalf no contributions were made might be estopped from claiming benefits from a plan" (Page 18, note 15.)

[11]See note 7, *supra*.

assets to satisfy any judgment. The construction industry is an industry of transient employers as well as transient employees, an industry in addition in which multiple corporate or other forms for a single employer — with all the legal problems of identification and collection that brings — are commonplace. It is also an industry in which undercapitalization of a single employer, known or unknown to its employees, is masked by the endemic division of capital (lender, developer, builder) and the employing unit (contractor, subcontractor). If the employer is still around and collectible when the funds come looking for him, the principal defense the employer will use is, or course, "estoppel".

7. The audit is the most efficacious means of assuring compliance with the fringe benefit provisions of the contract. To the extent the auditor is deprived of the necessary tools,[12] cheating is more likely to go undetected. To the extent it does, the actuarial foundation of the particular fund is threatened, all beneficiaries face a possible loss or diminution of benefits and/or those employers who are fully meeting their fringe benefit funding obligations are placed at a competitive disadvantage in the short run and at risk of having to make up funding shortfalls caused by the cheaters in the long run.

8. Granting the auditor more or less unrestricted access to an employer's books and records may, we recognize, give rise to the possibility of abuse or to a potential invasion of privacy of non-covered employees. Where these are real possibilities and not ruses to justify denial of access to revelatory records, the District Court has ample power to fashion an appropriate protective order.

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[12] As to what these "necessary tools" consist of and the purposes for which they are used are subjects discussed extensively in the *amicus curiae* brief which Arthur Young & Company submitted in support of the petition for writ of certiorari in this case.

CONCLUSION

Amici respectfully submit that the Sixth Circuit, focusing too exclusively on the possibilities of abuse and invasions of privacy, failed to give appropriate consideration to the practical and policy difficulties which would be caused by the application of the restrictive principles it enunciated. The focus, we urge, more properly belongs on protecting the participants of employee benefit plans and safeguarding the fiscal integrity of those plans. That court's decision, if allowed to stand, would frustrate the public policy enunciated in ERISA.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: July 11, 1984.

APPENDIX

(Unreported) decision of U.S. Court of Appeals
for the Sixth Circuit in
Hughes v *Baker Cement Contractors, Inc.*,
No. 81-3307 (July 6, 1982)

NO. 81-3307

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THURMAN HUGHES, ANTHONY D. LIBERATORE, MARTIN MASON, CHARLES PEARL, RICHARD STANDER, JR., PAUL SWEITZER, DREXEL J. THRASH and RICHARD L. WALLER, TRUSTEES of the OHIO LABORERS' DISTRICT COUNCIL-OHIO CONTRACTORS' ASSOCIATION INSURANCE FUND;

and

W. W. LATHROP, JR., JAMES BYRD, DONALD W. FITTON, JR., FORREST W. HUFF, TOM MOORE, DREXEL J. THRASH, CHARLES McKEE, and JOHN CALDWELL, TRUSTEES of the LABORERS' DISTRICT COUNCIL AND CONTRACTORS' PENSION FUND OF OHIO;

and

W. JOE NIEDHARDT, DREXEL J. THRASH, MARSHALL L. FLYNN, JACK E. KUEBLER, AMOS JACKSON, ROBERT F. BLIEILE, GERALD JONES and WILLIAM COPELAND, TRUSTEES of the OHIO LABORERS' TRAINING AND UPGRADING FUND,

Plaintiffs-Appellants,

vs.

BAKER CEMENT CONTRACTORS, INC.,

Defendant-Appellee.

ORDER

(Filed July 6, 1982)

Before: ENGEL and BROWN, Circuit Judges; and GUY, District Judge.*

*Honorable Ralph B. Guy, Jr., District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

This matter is before this court as a result of plaintiffs' appeal of a summary judgment granted in favor of the defendant in the district court.

Plaintiffs are the Trustees of the Ohio Laborers' District Council-Ohio Contractors' Association Insurance Fund, the Laborers' District Council and Contractors' Pension Fund of Ohio, and the Ohio Laborers' Training and Upgrading Trust Fund. These three funds are collectively bargained, multi-employer, Taft-Hartley fringe benefit funds established by agreements and declarations of trusts between the Labor Relations Division of the Ohio Contractors' Association, the Associated General Contractors of America, Inc., and Employers' Association and the Laborers' District Council of Ohio of the Laborers' International Union of North America, AFL-CIO, an association of a local laborers' union in Ohio.

The defendant is an Ohio corporation engaged in the building and construction industry within the State of Ohio.

On June 1, 1975, defendant became signatory to a collective bargaining agreement that had been negotiated between the Butler County Area Contractors' Association of Hamilton, Ohio, an association of employers, and Laborers' Local No. 534, a local union affiliated with the Ohio Laborers' District Council. This collective bargaining agreement obligated the defendant to make contributions to certain trust funds on behalf of its laborers who work within the geographical jurisdiction of Local 534, whether or not such laborers were in fact union members. Subsequent to entering into this collective bargaining agreement, the defendant, on October 13, 1975, executed another agreement entitled "Assent of Participation," which agreement bound the defendant insofar as trust fund contributions were concerned to the Ohio Laborers' District Council and the local unions of which it is comprised. Pursuant to these two agreements, the defendant made monthly fringe benefit contributions to the trust funds in question on behalf of those members of its work force performing laborers' work. On July 25, 1977,

plaintiff Trustees, pursuant to the relevant contract provisions, requested permission of defendant to perform an audit of its payroll records in accordance with the above-referenced agreements. On November 30, 1977, the audit was commenced but was not completed when the defendant advised the auditor that it would not provide payroll or other related records for employees other than those identified by the *defendant* as laborers on whose behalf a monthly contribution was owed. As a result of this refusal to make the requested records available, the plaintiffs instituted this action against the defendant.

At the final pretrial conference held in the trial court, the parties were directed by the district judge to present this matter on cross-motions for summary judgment rather than by way of trial. Pursuant to this direction, cross-motions for summary judgment were filed and, on April 21, 1981, the district judge entered an order of summary judgment essentially finding in favor of the defendant.

Plaintiffs, defendant, and the trial court were all in agreement that the plaintiffs are entitled to review such records as are necessary to fulfill their obligations under the collective bargaining agreement and the trust fund agreements. By implication at least, the parties are also in agreement that sufficient information was not furnished by the defendant to the plaintiffs in order for them to make a complete determination as to whether fringe benefit funds are being contributed by the defendant as required. The district court held, however, that the release of all the information requested by the plaintiffs would necessarily require the disclosure of additional information which was not needed by the plaintiffs and which the court deemed confidential in nature insofar as the employer was concerned. The trial court further concluded that the information that the Trustees needed was available from another source, i.e., the Union, and that therefore the missing information that they needed to complete their audit could be obtained by resorting to the Union and its records.

Although this appeal poses interesting questions which are being raised with increasing frequency as a result of the passage of the Employees' Retirement Income Security Act of 1974 (ERISA), this court concludes that it is unnecessary to reach those questions in order to determine this appeal. The decision of the trial court that the plaintiffs were entitled to the type of information that they sought in this lawsuit but could obtain it from other sources is erroneous and not supported by the record.

The trial court recognized that plaintiffs should not be wholly dependent upon the defendant's identification of who was working as a laborer and thus entitled to fringe benefit fund contributions. The court concluded, however, that because there was a Union security agreement in the collective bargaining agreement requiring all laborers to be Union members and, further, because the collective bargaining agreement provided for union stewards to be at each job site, that the Union would thus be able to definitively ascertain ...d identify those employees performing laborers' work on whose behalf contributions had to be made. This conclusion is fatally defective for two reasons.

First, defendant's collective bargaining agreement with Local 534 contained a "grandfather clause" which required that only those laborers hired after the effective date of the agreement, June 1, 1975, become members of Local 534. Thus, the defendant could have non-Union laborers on its payroll without being in violation of its agreement with Local 534.

Second, although the Assent of Participation agreement signed by the defendant also obligated it to make trust fund contributions in the geographic areas covered by Locals 423, 410, and 265, the defendant was not in fact signatory to any collective bargaining agreements with these other three unions. Thus, although the standard collective bargaining agreements of Locals 423, 410, and 265 contained "union security clauses," they were not binding upon the defendant because it had no

direct contractual relationship with these unions. Thus, the defendant could perform work in the geographic areas of these unions and use non-union labor. These two examples clearly demonstrate that there were at least two groups of employees of indefinite size for whom the employer was required to make trust fund contributions but whose eligibility for same could not be determined from Union records.

In addition, undue emphasis is placed upon the fact that in the geographic area under the jurisdiction of Local 534 there was to be a union steward on the job. One of the significant purposes achieved by the passage of ERISA was to set up independent trust funds and trustees with fiduciary responsibilities. This was for the purpose of protecting the employee against both management and the union. To suggest that the union steward is the ultimate safeguard as to who is doing laborers' work overlooks the fact that Congress, by the passage of ERISA, legislatively determined that employee retirement income and fringe benefits should not be left to the protection solely of management or union, but required the protection of an independent board of trustees.

Since the major premises on which the trial court determined that the plaintiffs could in fact achieve access to the information they needed are incorrect, it is necessary to reverse the summary judgment by the district court and remand for such further proceedings as will enable the plaintiffs to secure the information necessary for them to meet their fiduciary responsibilities under ERISA.

By way of further guidance to the parties on remand, this court would further note that it would not appear that a referral of this matter to arbitration is an appropriate vehicle for the resolution of this dispute at its current level. It may be that ultimately the parties will have a disagreement as to whether a given employee is performing laborers' work. Such a determination may or may not be properly referrable to arbitration based upon the provisions of the particular bar-

gaining agreements involved, but arbitration is not an appropriate vehicle for determining the nature and scope of the records to which plaintiffs should have access. The court would further note that the case of *Central States, Southeast and Southwest Areas Pension Fund* v *C.R.S.T., Inc.*, 641 F2d 618 (8th Cir. 1981), appears to be distinguishable from the case at bar on its facts.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

MOTION FILED

AUG 8 1984

No. 82-2157

IN THE

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION AND

BRIEF OF *AMICUS CURIAE* ARTHUR YOUNG & COMPANY

IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

MAY AN EMPLOYER, WHICH PARTICIPATES IN A MULTIEMPLOYER BENEFIT PLAN, REFUSE TO MAKE AVAILABLE ITS EMPLOYEE RECORDS, INCLUDING RECORDS OF ITS PURPORTEDLY NON-COVERED EMPLOYEES, WHICH IT IS REQUIRED BY STATUTE TO KEEP TO DETERMINE EMPLOYEE BENEFIT PLAN ELIGIBILITY, TO THE AUDITORS OF THAT MULTIEMPLOYER BENEFIT PLAN?

IN THE

Supreme Court of the United States

October Term, 1984

No. 82-2157

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF ARTHUR YOUNG & COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Arthur Young & Company ("Arthur Young") respectfully moves, pursuant to Rule 42 of the rules of this Court, for leave to file the annexed brief *amicus curiae*. Although the consent of counsel for the Petitioners has been obtained, the consent of counsel for the Respondents has been refused. This Court previously granted leave to Arthur Young to file a brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young

is the independent auditor of Petitioners, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund") and Central States, Southeast and Southwest Areas Health and Welfare Fund and also audits numerous employee benefit plans (several of which are multiemployer plans such as Petitioners). These audits permit the plan trustees to comply with the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 *et seq.*

Most employee benefit plans are required to file annual reports which include the plan's financial statements with the Department of Labor. The annual reports of plans with over 100 participants must include an independent accountant's opinion that the plan's financial statements have been audited in accordance with generally accepted auditing standards ("GAAS"). As is demonstrated in the brief *amicus curiae*, the ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants to audit multiemployer benefit plans in accordance with GAAS and thus materially impair the ability of the plan's trustees to comply with their fiduciary and statutory obligations.

Congress has required independent audits of the financial statements of employee benefit plans (*i.e.*, employee pension and employee welfare plans) to provide, *inter alia*, a level of assurance on the plan's financial statements. And although an independent audit also provides an important control on the administration of a plan,

> [t]he primary objective of a plan's financial statements is to provide financial information that is useful in assessing the plan's present and future ability to pay benefits when due.

FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 35 at ¶ 2 (1980).

In 1974 with the passage of ERISA Congress not only mandated an independent audit, but also required defined benefit

pension plans to have triennial actuarial valuations. Both the annual audit and triennial actuarial requirements are complementary: to assure that appropriate information is available so that plan participants and others (including regulatory authorities) can evaluate the ability of a plan to pay benefits when due.

When Congress enacted ERISA requiring that certain employee benefit funds be audited in accordance with GAAS, 29 U.S.C. §§ 1023, 1024, there existed a defined body of professional practice and literature detailing the procedures necessary to conduct a GAAS audit of multiemployer health and welfare benefit funds. These procedures included the testing of employer records. Congress knew that to conduct a GAAS audit the independent auditor would be required to test the adequacy of the funding of employee benefit plans according to the law and the terms of the plan. To accomplish this goal, the auditor, *inter alia*, performs tests to determine that the proper universe of plan participants has been identified, that contributions have been paid by the employer for each plan participant, and that participant benefit entitlements have been properly reflected in the actuarial calculations and related contributions received or receivable. GAAS thus requires not only the testing of the admittedly covered employees, but also testing for improper exclusion of covered employees from the contribution and benefit calculations; in other words, GAAS requires the ability to test the entire universe of employees.

Without the ability to determine the proper universe of plan participants it is impossible to determine if all required employer contributions have been made or if the actuarial valuation of a pension plan is correct. Since benefit eligibility in a multiemployer plan is determined by an individual's employment status, regardless of whether the employer has contributed to the plan, one may not be able to determine if a pension plan is underfunded[1] -- a major concern underlying the enactment of ERISA,

1. For example, if there were an annual under-reporting of only one half of one percent (.5%) of all participants currently estimated to be members of multiemployer pension plans (over 8,000,000 as of 1978) and the average employer contribution per participant to multiemployer plans were $50 a week (as it is in the National Master Freight Agreement at issue in the underlying proceeding), there would be an *annual*

29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Act of Sept. 26, 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 1208, and the creation of the Pension Benefit Guaranty Corporation, 29 U.S.C. §§ 1301-1309, in 1974.

Plan under-funding ultimately increases the burden on all employers, especially those who do not under-report their covered employees, since the resultant shortfall must be made up either by increased employer contributions to the fund from those remaining in the plan or by increased premium and/or withdrawal charges to employers by the Pension Benefit Guaranty Corporation ("PBGC"). Moreover, to the extent the existence of under-funding cannot be determined, payments imposed upon employers withdrawing from the plan cannot be properly calculated, contributing further to the financial uncertainty of multiemployer plans and increasing the ultimate burden on those who remain in the plan.

While recognizing a very limited right of access to employer data concerning purportedly non-covered employees, the opinion of the Sixth Circuit effectively precludes auditors from testing the universe of plan participants in most multiemployer plans. This restricted access to employer records creates a possible "scope" limitation on the audit. A significant "scope" limitation *ipso facto* results in a non-GAAS audit and would require the auditors to "qualify" or "disclaim" their opinion on employee benefit plan financial statements. The trustees would then fail to meet the statutory requirements for an audit of the plan financial statements in accordance with GAAS. Congress could not have mandated that plan trustees have a GAAS audit performed, knowing what such an audit entailed, and at the same time denied plan trustees the ability to fulfill that requirement.

---

initial under-funding of contributions in excess of $100,000,000 (40,000 omitted participants x $2600) for all multiemployer plans. The compounded lost earnings from these unmade contributions is staggering.

In addition to preventing a GAAS audit, restricted access to employer data by both the plan's independent and internal auditors significantly reduces internal control over employer contributions legitimately due the plan and thus increases the likelihood of plan under-funding. Prohibiting the auditor from routinely testing whether purportedly non-covered employees are actually covered eliminates the significant deterrent value of these audit tests. This increases the likelihood that employers -- either through inadvertent oversight or possibly as a result of intentional under-reporting -- will fail to report and make required contributions for covered employees.

Thus *amicus curiae* Arthur Young has a direct interest in the outcome of this proceeding -- not only as it affects its ability to conduct its audits of the Central States Pension and Welfare Funds but also its ability to conduct audits of other multiemployer benefit plans. As a result of the Sixth Circuit opinion, one employer has already refused access of its employment records to Arthur Young in the course of its audit of The Central States Pension Fund and Arthur Young is concerned that other employers will do likewise.

WHEREFORE, Arthur Young respectfully moves this Court that leave be granted to it to file the annexed brief *amicus curiae*.

Dated: August 9, 1984

Respectfully submitted,

/s/ Carl D. Liggio

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IN THE

Supreme Court of the United States

October Term, 1984

No. 82-2157

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ARTHUR YOUNG & COMPANY

Preliminary Statement

Arthur Young & Company ("Arthur Young") submits this brief as *amicus curiae* and urges that this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983).

This case materially affects the ability of over 2000 multiemployer pension plans with more than 8,000,000 plan participants and over $50 *billion* in assets to comply with Congressionally mandated audit (and actuarial) requirements. The case also

impacts multiemployer welfare plans. In fact, if the decision of the Sixth Circuit is allowed to stand, the salutary purposes of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 1208, could be substantially jeopardized.

INTEREST OF *AMICUS CURIAE*

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young is the independent auditor of Petitioners, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund") and Central States, Southeast and Southwest Areas Health and Welfare Fund ("Welfare Fund"), as well as numerous employee benefit plans, several of which are multiemployer plans such as Petitioners. These audits permit the plan trustees to comply with ERISA, 29 U.S.C. §§ 1001-1461 (1976 & Supp. V 1981), and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 (1982) *et seq.*

Most employee benefit plans are required to file an annual report, which includes the plan's financial statements, with the Internal Revenue Service which furnishes a copy to the Secretary of Labor. With respect to those plans with over 100 participants, ERISA requires an independent auditor to conduct "an examination of any financial statements of the plan" in accordance with Generally Accepted Auditing Standards ("GAAS"), 29 U.S.C. § 1023(a)(3)(A), so that the annual reports of those plans will include an independent accountant's opinion on whether the plan's financial statements and certain required schedules are presented fairly in accordance with Generally Accepted Accounting Principles ("GAAP"). *Id.* The ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants, such as

Arthur Young, to conduct audits of multiemployer benefit plans in accordance with GAAS.

Thus *amicus curiae*, Arthur Young, is vitally interested in having this Court resolve the question presented by this case:

> **May an employer, which participates in a multiemployer benefit plan, refuse to make available its employee records, including records of its purportedly non-covered employees, which it is required by statute to keep to determine employee benefit plan eligibility, to the auditors of that multiemployer benefit plan?**

THE PROCEEDING BELOW

In fulfilling the Trustee's statutory obligations, the joint internal audit staff of Petitioners, Central States Pension and Welfare Funds, both of which are multiemployer benefit plans, sought to examine the employment records of Respondents, who are contributing employers, to ascertain whether Respondents had employees who were covered by the plans and for whom funding contributions had not been made by their employers (the Respondents). After finding inconsistencies in employee reported data and ascertaining that there were upward adjustments in the accounts due from the employers (Respondents) of at least $268,000, the auditors sought to make further inquiries. When the employers (Respondents) refused access to their records and ejected the Central States internal auditors, the Central States Pension and Welfare Funds obtained an injunction directing Respondents to make the necessary records available. 522 F. Supp. 658 (E.D. Mich. 1981). On appeal, the Sixth Circuit reversed, holding that Petitioners had no right to review such records. 698 F.2d 802, 806.

SUMMARY OF ARGUMENT

In denying access to the records of purportedly noncovered employees, the Sixth Circuit committed several critical errors:

(1) it narrowly viewed the trustees' responsibilities and ignored the statutory requirement that the trustees obtain an annual independent audit in accordance with GAAS and an opinion as to whether the plan's financial statements were prepared in conformity with GAAP consistently applied;

(2) it concluded that although certain limited rights of inspection might be available to the funds, as a matter of law no "audit" of an employer's complete employee records to ascertain plan participants by the funds was authorized, 698 F.2d at 806, *but failed to recognize* that access to such records is inherently related to the required independent audit of the plan; and

(3) it concluded as a matter of law that an "audit" of an employer's complete employee records was "arbitrary and capricious,"[1] *even though* the court conceded that under the plan trust agreements there was a "reasonable cause" standard supported by the "prudent man" standard of ERISA, 29 U.S.C. § 1104(a)(1)(B), which allows a right of investigation, 698 F.2d at 810-811.

Upon analysis, these holdings are internally inconsistent as well as inconsistent with ERISA. Contrary to the holding of the Sixth Circuit, ERISA implicity authorizes access to *all* employee records of employers who participate in multiemployer benefit plans so that the plan trustees can meet the statutory reporting requirements and fiduciary obligations imposed by ERISA. By denying even limited access to an employer's employee records to

1. In so finding the Court also found that such audits were a waste of assets. 698 F.2d at 811. This finding was made by the Sixth Circuit without any factual basis. In fact, the finding runs counter to established precedent and what is in fact the case. *See, infra,* n. 7.

determine whether employees are improperly excluded and contributions omitted, the decision of the court of appeals effectively precludes the trustees from fulfilling their statutory obligations and makes an independent audit of the plan difficult, if not impossible. The decision of the court of appeals negates the substantial deterrent effect of the possibility of an audit, and jeopardizes the solvency of employee benefit plans by increasing the possibility of under-funding. The decision also adversely impacts the accurate calculation of fund termination payments upon withdrawal of an employer from the plan.

The Sixth Circuit decision in *Central States* has already resulted in troubling and unwarranted consequences. For example, the Seventh Circuit has interpreted the decision in *Central States* as limiting a plan trustee's ability to determine plan coverage. *Wolfe v. J.C. Penny Co.,Inc.*, 710 F.2d 388, 393 (7th Cir. 1983). Allowing the decision of the Sixth Circuit to stand will no doubt lead to further erosion of the ability to protect pension benefit plans and continued undermining of Congressional intentions in enacting ERISA.

ARGUMENT

I.

BACKGROUND-MULTIEMPLOYER PLANS

Multiemployer benefit plans are generally industry wide employee benefit plans covering all or some of a participating company's employees, 29 U.S.C. § 1002 (37). These plans provide a variety of retirement, health, and welfare benefits. They are usually jointly administered by management and labor under a collective bargaining agreement.

Covering employees of more than one company, multiemployer plans can include hundreds or even thousands of employers from all over the country, or only a few employers in one area. Plan participants may include both union and non-union employees. Over 8,000,000 employees in construction, mining, shipping, trucking, food retailing, textiles, and other industries currently

participate in over 2000 multiemployer plans[2] covering approximately 25 percent of all U.S. workers protected by defined benefit pension plans in the private sector. NATIONAL JOURNAL, June 26, 1982 at 12. A 1980 Department of Labor study estimated that more than 16 million workers will be covered by multiemployer pension plans by the year 2000. 1979-1981 PENS. PLAN GUIDE ANNOT. (CCH) ¶ 22,877 (Oct. 15, 1980).

Virtually all plans require contributions solely from employers. *Id.* For these plans funding is dependent solely upon employer contributions; and plan eligibility is determined "solely on the basis of service performed for a participating employer, regardless [of] whether that employer . . . has made or defaulted on his required contributions." Advisory Opinion, 31 August 1976, PENS. REP. (BNA), No. 221, Jan. 8, 1979; *Van Gunten v. Central States*, 672 F.2d 586, 589 (5th Cir. 1982). Accordingly, even if an employer fails to report the employee as a participant and does not make the required contributions, the multiemployer plan is nonetheless obligated to pay benefits to the employee when demanded. *See* 29 U.S.C. §§ 1052, 1053; 29 C.F.R. § 2530.200b-2(a)(1)(2). Thus, failure to make contributions for all employees covered by the plan leaves the plan under-funded.

This Court has only recently reaffirmed that among the purposes of ERISA was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of inadequately funded pension plans. *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Company*, 52 U.S.L.W. 4810, 4811 (U.S. April 16, 1984). Congress wanted to guarantee that "if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980).

Although multiemployer plans were subject to ERISA, it was the Multiemployer Pension Plan Amendments Act of 1980

2. As of 1982 multiemployer plans controlled over $50 billion in assets. Lublin, *Law to Protect Multi-Employer Pensions Is Causing Hardship for Many Businesses*, Wall St. J. Mar. 5, 1982 at 40, col. 1.

(MEPPAA) which directly addressed the growing concern over inadequate funding of multiemployer plans. The Pension Benefit Guaranty Corporation (PBGC), which must provide benefits to participants in those plans which terminate with insufficient assets to support their guaranteed benefits found, that:

> 12 percent of all multiemployer pension plans, covering one-fifth of all multiemployer pension plan participants, are experiencing extreme or significant financial hardship which may result in plan termination. . . . Two percent of all multiemployer plans, with a total unfunded, vested liability of more than $350 million, were found to be experiencing extreme financial hardship and to have a high potential for termination. The remaining 10 percent were deemed to have a significant potential for termination, with a total unfunded vested liability of $3.5 billion.

S. REP. No. 570, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4128, 4129 (footnote omitted). Inadequate funding caused by, *inter alia*, under-reporting and declining work forces in certain industries could lead to billions of dollars in unfunded liabilities, far more than the resources available to the PBGC to cover any failures. PENSION BENEFIT GUARANTY CORPORATION, *Multiemployer Study Required by P.L. 95-214* (1978), Appendix I, Potential Multiemployer Plan Liabilities Under Title IV of ERISA.

II.

CONGRESS DIRECTED THAT MULTIEMPLOYER BENEFIT PLANS HAVE ANNUAL INDEPENDENT AUDITS OF PLAN FINANCIAL STATEMENTS IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS

A. The Audit Requirement

Congressional concern with employee benefit funds dates back to the enactment of the 1947 Labor Management Relations Act. H.R. REP. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1135, 1173, when Congress sought to

protect certain employee benefit funds by requiring that the funds be subject to an annual audit. 29 U.S.C. § 186(c)(5).

The legislative history reveals that the annual audit requirement was intended to put safeguards on the improper and unsuccessful administration of employee benefit funds. Accordingly, Congress decreed that company contributions to employee benefit funds would not constitute an unfair labor practice if such funds were "guarded by certain restrictions, such as that it should be . . . subject to joint control by employer and employees *and by an annual audit* to insure its protection as a trust fund." 93 CONG. REC. 3565 (1947). (Emphasis added).

In 1974 ERISA supplemented existing reporting and disclosure requirements with provisions requiring the reporting of more detailed information concerning the administration of plan assets and the payments of benefits. Moreover, it continued and strengthened the independent audit requirement, 29 U.S.C. § 1023(a)(3)(A), by adding to the arsenal of weapons to protect employee benefit plans already available to the Secretary of Labor the right to hire independent auditors to audit such plans, 29 U.S.C. § 1024(a)(5).

In enacting ERISA Congress was also concerned over the adequacy of information available on employee benefit plans. The House Report, evidencing this concern, noted that:

> . . . experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan -- what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time, the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and

> that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

H. R. REP. NO. 533, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4649.

The Senate Report similarly concluded that an opinion of an independent auditor based upon the results of an annual audit would "allow better assessment of the plan's financial soundness by administrators and participants alike." S. REP. NO. 127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4864. The Conference Report, recognizing the importance of the audit requirement, specifically noted that *"the accountant is to give an opinion as to whether the financial statements of the plan conform with generally accepted accounting principles and the statement is to be based upon an examination in accordance with generally accepted auditing standards."* H. CONF. REP. 1280, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5040. (Emphasis added).

B. What an Audit of a Multiemployer Benefit Plan in Accordance With GAAS Entails

1. *Auditing employer records*

When Congress enacted ERISA and mandated that employee benefit plans be subject to an examination in accordance with GAAS, a body of professional literature and practice existed outlining the procedural steps required for audits in general and audits of employee benefit plans in particular. For example, in 1972, the American Institute of Certified Public Accountants published an Industry Audit Guide, AICPA, AUDITS OF EMPLOYEE HEALTH AND WELFARE BENEFIT FUNDS, ("1972 INDUSTRY AUDIT GUIDE") which, although not directly controlling audits of pension plans, summarized audit requirements

that had general applicability to pension plans and specific applicability to employee health and welfare funds such as the Petitioner, Central States Welfare Fund. The Guide noted that in addition to its specific requirements:

> Generally accepted auditing standards apply to audits of an employee health and welfare benefit fund to the same extent they apply to the audits of a commercial enterprise.

1972 INDUSTRY AUDIT GUIDE at 18.

The 1972 INDUSTRY AUDIT GUIDE reviewed the critical areas of employee health and welfare benefit fund audits. One such area was the audit of employer contributions -- the basic funding vehicle for any benefit plan:

> Contributions
>
> The basic objective in auditing contributions is to determine that amounts due the fund have been received and properly recorded and that employer records and participant records (eligibility or vacation contribution) are being properly maintained.
>
> * * *
>
> The auditing procedures employed should normally include, but are not necessarily limited to, the following:
>
> (1) Total cash receipts shown by the cash receipts book for a selected period should be reconciled to the total amount credited to the general ledger contribution accounts, to the total amount posted to the employer's record, and to deposits shown by the bank statements.
>
> (2) Selected individual employer contribution payments as shown by the cash receipts book should be compared to the amount shown on the employer's contribution report and to the amount posted to the individual employer's contribution record. Selected postings to the employer's record during the test period should be traced to the cash receipts book and to the employer's contribution report.

Id. at 19.

These procedures were initially directed at an audit of the plan's own records. However, when the auditor deemed it necessary and a direct review of an employer's complete employee records was undertaken, these same procedures were applied. Such procedures would include:

> Payroll Audits
>
> There may be circumstances in which the independent auditor is engaged to conduct audits of employers' payroll records to determine the propriety of the contributions made. The following paragraphs outline certain procedures which should be considered in the audits of employers selected:
>
> (1) The collective bargaining agreement should be reviewed to determine that the employer has complied with the applicable provisions.
>
> (2) The total gross earnings shown by the employees' earnings records should be reconciled with total wages shown by the general ledger and the payroll tax reports.
>
> (3) Information shown on the employer's contribution reports for a selected number of participants should be compared with the data shown on the employees' earnings records. In addition, a selected group of participants' earnings records should be compared with the employer's contribution reports to ascertain that they have been properly included or excluded from the reports.
>
> (4) The employer's general cash disbursements book should be reviewed to ascertain whether any payments not recorded as compensation have been made to employees.
>
> (5) For a selected period of time and for a selected group of employees, the data shown in the payroll journal should be compared to the employee earnings records and time records, and the related payroll checks should be examined.
>
> All exceptions to the foregoing tests should be cleared to the independent auditor's satisfaction.

Id. at 20-21.

In order to verify participants' data, and gain assurance that participant records and related pension plan liabilities are neither understated nor overstated, the auditor must be able to test the entire universe of an employer's employees, including non-participants.[3] As the pre-ERISA auditing literature and practice clearly indicated, verification of participation data is an integral part of a benefit plan audit in accordance with GAAS.[4]

---

3. The audit literature applicable to all audits provides substantial guidance as to the problem raised by the possible failure to include all participants:

> When planning a particular sample [for a substantive test], the auditor should consider the specific audit objective to be achieved and should determine that the audit procedure, or combination of procedures, to be applied will achieve that objective. The auditor should determine that the population from which he draws the sample is appropriate for the specific audit objective. *For example, an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.*

AICPA, STATEMENT ON AUDITING STANDARDS ("SAS") No. 39, AICPA Professional Standards Volume A, U.S. Auditing Standards as of June 1, 1984 ("AICPA PROFESSIONAL STANDARDS"), AU350.17. (Emphasis added.)

4. In recognition of applicable professional standards, Arthur Young's own internal ERISA audit manual provided:

> The objective of the verification, when necessary, is to ascertain whether the data is complete, primarily that all eligible participants are included and that all relevant data has been provided, and accurate. (Eligible participants include present employees who meet the participation requirements of the plan, terminated employees who have vested benefits, and retired employees or their surviving spouses or other dependents receiving benefits.) Verification procedures usually include:
>
> - Determining benefit eligibility requirements and the statistical data about eligible participants necessary for the actuary to make his computations.
> - Testing the completeness and accuracy of the list of eligible employee participants by applying the eligibility requirements to employment records, both for employees on the list and not on the list.
> - Testing the accuracy of the statistical data about other eligible participants by reference to employment and payroll records.

The 1972 INDUSTRY AUDIT GUIDE further prescribed that a "disclaimer" of opinion on the financial statements of a multiemployer benefit plan would be appropriate when the auditor could not gain assurance as to "the propriety of employer contributions." *Id.* at 29. Such a "disclaimer" of opinion results from an inability to apply all of the procedures required by GAAS -- such as the ability to test the universe of employees. AICPA, SAS No. 2, AICPA PROFESSIONAL STANDARDS, AU509.12 and AU509.45.

In 1983, the AICPA issued a new Audit and Accounting Guide, covering all employee benefit plans, which codified existing literature and prior practice: AICPA, AUDITS OF EMPLOYEE BENEFIT PLANS (1983) ("1983 INDUSTRY AUDIT GUIDE"). This 1983 INDUSTRY AUDIT GUIDE, which was first issued as an exposure draft in 1980, expressly recognizes, as had the 1972 INDUSTRY AUDIT GUIDE, that "in examining the financial statements of a multiemployer plan, the auditor may need to make special arrangements to examine employer records," *id.* at 56; and concludes, as did the earlier Guide, that "[i]f the auditor is unable to obtain the necessary assurance regarding participants' data, he ordinarily should conclude that it will be necessary to express a qualified opinion or disclaim an opinion because of the limited scope of the examination." *Id.* at 63.

In imposing a GAAS audit requirement, Congress did so in the face of an established body of procedures which contemplated access to and, when needed, an audit of employer records to test plan participation data such as plan membership and contributions. Without access to and, when necessary, the ability to audit employer records, the GAAS audit requirement imposed by Congress cannot be met.

2. *The use of internal auditors to satisfy GAAS*

In conducting an independent audit, not every record of the entity under audit is examined. The independent auditor studies

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- Testing the accuracy of the employment and payroll records from which the data is obtained.

ARTHUR YOUNG ERISA AUDIT MANUAL § 8.105.

and evaluates a client's internal accounting controls to determine which records will be tested and the degree of reliance which can be placed on those records and internal accounting controls. AICPA, SAS No. 1, AICPA PROFESSIONAL STANDARDS, AU320. One aspect of internal accounting control which has a bearing on the extent of the independent auditor's procedures is the presence of an effective internal audit function. AICPA, SAS No. 9, AICPA PROFESSIONAL STANDARDS, AU322. The independent auditor evaluates how the internal audit function relates to the system of internal accounting controls and then considers the extent to which the internal audit staff may perform parts of the audit under the independent auditor's supervision. *Id.*

For example, in the audits of the Central States Pension Fund and Welfare Funds, Arthur Young not only independently tests plan participation data by, *inter alia*, directly testing employer records, but also uses the work of the internal auditors in this area. 1972 INDUSTRY AUDIT GUIDE at 15; 1983 INDUSTRY AUDIT GUIDE at 62. Based on Arthur Young's review of fund records, it may request the internal audit group to examine certain employer's records or do so itself. Arthur Young also reviews the work performed by the internal auditors with respect to the audits of employer records. Accordingly, the work of the internal audit function, which is at issue here, is an integral part of Arthur Young's independent audit required by statute. 29 U.S.C. § 1023(a). Absent the work of the internal auditors, Arthur Young would have to materially increase its own procedures[5] at increased cost to the plan or render a "qualified" or "disclaimed" opinion based on a "scope" limitation in the audit caused by the failure to have access to all records necessary to render its opinion on the plan's financial statements.

5. One employer has already refused Arthur Young access as a result of the Sixth Circuit's decision. In addition, Arthur Young's audit work papers show that there were 16 instances of employer "turn downs" to access by the internal auditors of employer records during the period June 13, 1983 to March 31, 1984.

C. The Impact of a Qualified Auditor's Opinion

ERISA requires a GAAS audit to enable the independent auditor to opine as to whether the financial statements fairly represent the financial position of the plan in conformity with generally accepted accounting principles consistently applied. 29 U.S.C. § 1023(a)(3)(A). The Department of Labor has authorized independent auditors to have "scope" limitations in the audit in a very limited category of situations not applicable here. 29 C.F.R. § 2520.103-8. A "qualified" or "disclaimed" opinion resulting from a "scope" limitation relating to the inability to test plan participation data indicates a non-GAAS audit and does not comply with the statutory requirements of the Labor Management Relations Act of 1947 or ERISA. Arthur Young has been orally informed by the Department of Labor that in all likelihood the submission of an opinion containing such a "scope" limitation will be treated as a failure by a plan to comply with the Annual Report filing requirements. *Cf.* 29 C.F.R. § 2520.103-1(b)(5)(iv) and § 2520.103-2(b)(5)(iv).

III.

CONGRESS INTENDED PLANS TO HAVE ACCESS TO ALL EMPLOYER RECORDS

A. Access to all Employer Data was Contemplated by Congress in Order to Satisfy the Audit Requirement

One objective of financial statements of employee benefit plans is to permit the assessment of the adequacy of a plan's present and future ability to pay benefits to covered employees. FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 35 at ¶2 (1980). The Sixth Circuit decision, restricting the scope of an audit only to employer records of concededly covered employees, defeats this objective.

Since multiemployer plans are liable for benefits to eligible employees regardless of whether a particular employer has made

contributions on the employees' behalf, *see* 29 U.S.C. §§ 1052, 1053, Department of Labor Advisory Opinion No. 76-89, 31 August 1976, PENS. REP. (BNA), NO. 221. JAN 8, 1979); *Van Gunten v. Central States, supra*, it is essential in determining the plan's financial integrity to ascertain whether any plan participants have been omitted and whether all required contributions have been made. If access to the "entire universe" (*i.e.*, both admittedly covered and allegedly non-covered employees) of plan participants is denied, no one will be able to assess whether the plan financial statements reflect all benefits for which the plan will ultimately be responsible and, more importantly, all contributions required to fund those benefits.

It is in this context that Congress required employers to maintain records for all employees,[6] not just plan participants, 29 U.S.C. § 1059(a), and imposed penalties on employers who failed to keep such records. 29 U.S.C. § 1059(b). Moreover, Congress imposed reporting obligations on employers based on these record keeping requirements. 29 U.S.C. § 1059(a).

A court imposed "scope" limitation on access to all employer records is likely to create an insurmountable audit problem to discovery of instances of under-reporting and non-reporting of employees who are in fact covered by and entitled to plan benefits. To deny access to those records inhibits crucial auditing procedures, violates established standards of auditing practice, and essentially renders the reporting, disclosure, and auditing requirements of ERISA and the Labor Management Relations Act ineffective.

When Congress enacted the audit requirements of ERISA and established the foregoing employer record keeping and reporting requirements for *all* employees, existing audit practices included the testing of employer records to determine whether there were unreported employees who were nevertheless entitled to benefits and thus payments due the plan to cover those employee benefits.

---

6. The definition of employee as set forth in ERISA, 29 U.S.C. § 1002 (6) includes any individual employed by an employer. Thus, ERISA fails to make a distinction between "covered" and "non-covered" employees.

Supra at 9-13.[7] As the record keeping requirement complements the audit requirement by assuring the availability of information to make the necessary evaluations, the two provisions should be read together. For Congress to have denied access to the very records which it has required employers to keep to determine both plan eligibility and the amount of employer contributions as the court of appeals held, while at the same time to have required an audit, which by definition includes an examination, *inter alia*, of records to determine the universe of plan participants, creates an internal inconsistency in the statute, which Congress could not have intended.

Application of the basic rules of statutory construction further supports the view that the Sixth Circuit decision is contrary to Congressional intent and inconsistent with the applicable statute. It is an established tenet of statutory construction that acts of Congress relating to the same subject matter are to be read *in pari materia*. *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412

7. It is a given that audits of payroll records can result in substantial recoveries of monies which are due to multiemployer plans, but have not been paid because neither proper information nor employee coverage has been reported to the multiemployer plan. *See, e.g., Jim McNeff, Inc.* v. *Todd*, 103 S. Ct. 1753 (1983) (audit revealed that employer owed more than $5,000 on behalf of five employees that employer had never reported as covered); *Laborers Health & Welfare Trust Fund* v. *Kaufman & Broad of Northern California, Inc.*, 707 F.2d 412 (9th Cir. 1983) (audit indicated a discrepancy exceeding $130,000 due to controversy regarding covered or uncovered status of particular nonunion labor); *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), *reh'g denied*, 711 F.2d 713 (1983), *cert. denied*, 52 U.S.L.W. 3844 (U.S. May 21, 1984) (audit uncovered more than $100,000 due on behalf of covered employees who employer erroneously believed were not covered); *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981) (deficiency of more than $25,000 revealed due to failure to contribute on behalf of nonunion covered employees). *I.A.M. National Pension Fund* v. *Industrial Gear Manufacturing Company*, 723 F.2d 944 (D.C. Cir. 1983) (audit revealed that employer had failed to make payments in excess of $90,000). Based on information obtained from Central States during the audit process, Arthur Young's audit records show that as a result of these audits by the Central States internal audit function, substantial adjustments and recoveries from employers have been made. For example, in the 12 months since July 1983, there were 50 internal audits of employers at an estimated cost to Central States of $770,000. These audits produced assessments totaling $5,540,000 or a potential 7 to 1 return.

U.S. 609, 631-32 (1973) [separate provisions of a single act should be interpreted to give the Act "the most harmonious, comprehensive meaning possible" in light of the legislative policy and purpose]. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, § 51.03 (4th ed. 1973). This harmony can only be achieved here if 29 U.S.C. § 1059 is read as a grant of authority to enable a plan to fulfill its statutory audit requirement by obtaining access to all employee records.

Finally, although the Sixth Circuit recognized that there is a "reasonable cause" standard which allows access to employer records, 698 F.2d at 810, it felt it was arbitrary and capricious to "audit" *all* employee records of the employer, *id.* at 811, notwithstanding the fact that the internal auditors had found errors and omissions in the data reported by the employers (Respondents). This holding failed to consider the statutory requirement imposed upon the plan's trustees to obtain an independent audit of the plan and a "clean" or "unqualified" opinion on the plan's financial statements free from any "scope" limitation resulting from limited access to employer records. Since the failure to obtain access to the employer records could result in a non-GAAS audit and a "qualified" or "disclaimed" opinion on the plan's financial statements, it follows that the Sixth Circuit's holding that a request for inspection of "non-covered" employee records is "arbitrary and capricious" is, *a fortiori*, incorrect. In fact, failure to seek access to the records may be a failure by the trustees to maintain adequate internal controls which, *inter alia*, could result in a scope limitation in the audit and could well violate the "prudent man" standard found in ERISA, 29 U.S.C. § 1104(a)(1)(B); and such failure might mandate that the independent auditor obtain access to those employer records.

Moreover, the holding fails to consider both the monetary benefit such audits result in (*supra*, n. 7) and the substantial deterrent effect they have.

B. Access to all Employer Data was Contemplated by Congress in Order to Ascertain Funding Requirements

Another Congressional concern was the possible draining of fund assets in the future by persons unidentified in the plan records and for whom employer contributions were not made. At the time such under-reporting becomes known, the employer responsible may be neither in business nor a participating employer. The employer who created the under-funding then escapes the liability and the burden is imposed on other employers who have already paid their fair share.

1. *Lack of access to employer data precludes adequate funding determinations required by Congress*

The passage of MEPPAA in 1980 significantly changed an employer's funding responsibilities in a multiemployer plan. An employer's obligation to fund benefits is no longer limited to its negotiated contribution plus a modest contingent liability upon withdrawal. Thus in order to minimize the impact of under-funding, MEPPAA provided that, to the extent multiemployer pension plans were under-funded, all employers in the plan could be assessed to cure the under-funding. 29 U.S.C. § 1421 *et. seq.*

The withdrawal liability provisions of the MEPPAA are a central part of the solution adopted by Congress to protect the benefits of participants in multiemployer pension plans. *Washington Star Company* v. *International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1505 (D.C. Cir. 1984). Upon complete or partial withdrawal from an on-going multiemployer plan, the withdrawing employer incurs an immediate liability for a share of the plan's unfunded vested benefits, 29 U.S.C. § 1381 *et. seq.*, *not just* the under-funding caused by the withdrawing employer. MEPPAA describes a variety of methods by which a plan may calculate the amount owed by a withdrawing employer. 29 U.S.C. § 1391. In three out of the four methods described, amounts are reallocated from other employers who, by terminating their plans without fully funding their liability because of under-reporting or otherwise, have escaped liability. *Id.*

Similarly, if a plan does not meet the funding standards required by the Act, a plan may be placed in reorganization and an employer's contribution may be increased to prevent the plan from terminating. 29 U.S.C. § 1423(b). If a plan terminates, participating employers may be required to continue to contribute in order to fund the plan's unfunded vested benefits of the terminated plan.

Thus, the burden for such latent benefits due to under-reporting falls on all employers[8] through increased future contributions to the plan and, probably, increased insurance premiums to the PBGC. To the extent the latent benefits were caused by previously withdrawn employers, participating employers and those subject to plan termination charges become liable for benefits earned by workers who were never in their employ.

Unless the total universe of plan participants is identified, the actuarial computations to determine plan funding, 29 U.S.C. §§ 1023(d) and 1393, and withdrawal liabilities, 29 U.S.C. § 1391, are suspect, and both an employer's current funding obligations and withdrawal liabilities cannot be accurately determined, if they can be determined at all. Accordingly, access to all employee data to ascertain that all plan participants are reasonably accounted for and required contributions made is essential to the proper administration of multiemployer plans. Thus, the passage of MEPPAA makes the need for comprehensive audits to permit reliable assessment of funding liability all the more critical.

---

8. As this court recognized in *Schneider Moving & Storage Company* v. *Robbins*, 104 S. Ct. 1844, 1850 (1984), the failure of an employer which participates in a multiemployer plan to properly fund its share of the liabilities adversely affects other employers, thus:

> "Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective-bargaining agreement would have an adverse effect on the other participants."

2. *The PBGC is adversely affected*

In order to insure that payments will be made to all employees entitled to benefits, Congress created an insurance funding mechanism through the PBGC. Employers in multiemployer plans are assessed an "insurance premium" to cover both actual and estimated shortfalls in benefit payments because of under-funded plans. 29 U.S.C. §§ 1301 *et seq*. The PBGC constantly reviews both the financial statements and actuarial reports of pension plans to assess the adequacy of funding. Failure to have reliable information on which to make these critical assessments would impair the ability of the PBGC to effectively fulfill its statutory mandate.

CONCLUSION

If there is a failure to report only one half of one percent (.5%) of the employees eligible to participate in all multiemployer plans, contributions to multiemployer pension plans will be under-funded at an *initial* rate of over $100,000,000 *per year*.[9] Congress clearly did not intend such a result; in fact, the legislative history shows Congress intended the audit and actuarial functions to be an important line of defense against such potential under-funding. The decision of the Sixth Circuit is inconsistent with clearly defined obligations imposed upon both the trustees and independent auditors by Congress. The decision substantially undermines the ability to assess the adequacy of funding of all multiemployer benefit plans and could lead to substantial instances of under-reporting of covered employees either through inadvertence or

9. In 1978 it was estimated that there were over 8,000,000 employees participating in multiemployer plans. This number is expected to grow to 16,000,000 participants by the year 2000. Assuming the average employer contribution is $50 a week per "covered" employee as it is in the National Master Freight Agreement at issue here, there is an annual under-funding of contributions in excess of $100,000,000 a year (40,000 omitted participants X $2600). When the lost compounded earnings that would have been generated by these contributions is taken into account, the amount of the under-funding becomes staggering. Using a compounded rate of 10%, within 4½ years multiemployer plans would be under-funded by almost ½ *billion* dollars if funding were not provided for over .5% of the covered employees.

design. Thus the deterrent effect of the audit process would be substantially weakened. Finally, the ability to calculate employer plan withdrawal liabilities is adversely impacted.

WHEREFORE, *amicus curiae* Arthur Young respectfully requests that this Court reverse the decision of the Sixth Circuit Court of Appeals.

Dated: August 9, 1984

Respectfully submitted,

/s/ Carl D. Liggio

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APPENDIX

§ 1002. Definitions

For purposes of this subchapter:

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

§ 1023. Annual Reports

(a)(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies.

* * *

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include --

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to

form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 1024 (b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply.

* * *

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

* * *

(4)(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) An annual report under this section shall include a financial statement containing the following information:

* * *

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of

revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

* * *

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

* * *

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

Actuarial statement

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section

for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report if filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination priority categories as set forth in section 1344 of this title, and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary --

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

§ 1024. Filing and furnishing of information

(a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary --

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing)

* * *

(5) If the Secretary rejects filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not

submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions --

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

§ 1030. Alternative methods of compliance

(a) The Secretary on his own motion or after having received the petition of an administrator may prescribe an alternative method for satisfying any requirement of this part with respect to any pension plan, or class of pension plans, subject to such requirement if he determines --

(1) that the use of such alternative method is consistent with the purposes of this subchapter and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary,

(2) that the application of such requirement of this part would --

(A) increase the costs to the plan, or

(B) impose unreasonable administrative burdens with respect to the operation of the plan, having regard to the particular characteristics of the plan or the type of plan involved; and

(3) that the application of this part would be adverse to the interests of plan participants in the aggregate.

(b) An alternative method may be prescribed under subsection (a) of this section by regulation or otherwise. If an alternative method is prescribed other than by regulation, the Secretary shall provide notice and an opportunity for interested persons to present their views, and shall publish in the Federal Register the provisions of such alternative method.

§ 1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.

The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who --

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 1053(b)(3)(A) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be

required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section --

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted --

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a partial withdrawal described in section 1385 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall --

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., PETITIONERS

v.

CENTRAL TRANSPORT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, permits the trustees of a multiemployer employee benefit plan to audit records of an employer participating in the plan to verify that the employer is making contributions on behalf of all employees for whom they are due.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-2157

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., PETITIONERS

v.

CENTRAL TRANSPORT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case will clarify the authority of trustees of a multiemployer employee benefit plan that is subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Multiemployer Act), Pub. L. No. 96-364, 94 Stat. 1208 *et seq.*, to verify, by appropriate audits of the records of employers participating in the plan, that the employers are remitting contributions on behalf of all employees for whom they are due. The United States has a substantial interest in the proper resolution of this issue.

The Secretary of Labor is charged with administering the employee benefit rights protection provisions (Title I)

of ERISA. Failure to recognize auditing authority in employee benefit plan trustees sufficient to enable them to enforce employer contribution and funding obligations would shift to the Secretary the burden of detecting contribution delinquencies—a burden that Congress intended to be borne by plan trustees. It would also threaten the integrity of the plans that the Secretary has been directed to protect. In addition, the court of appeals' decision, by undermining the efficacy of fiduciary safeguards for assuring that all required employer contributions are made, has the potential to impose financial burdens upon the employee benefit plan termination insurance fund established pursuant to Title IV of ERISA, and to impose administrative burdens upon the Pension Benefit Guaranty Corporation, a wholly owned government corporation that administers the insurance program.

This Court recognized the substantial interest of the United States in the question presented by inviting the Solicitor General to express the government's views at the petition stage. The United States filed a brief as amicus curiae in support of the Petition.

STATEMENT

1. Petitioners are multiemployer employee benefit plans subject to ERISA and the Multiemployer Act (29 U.S.C. 1001 *et seq.*). Petitioners provide health, welfare and pension benefits to certain persons whose employers are engaged in interstate trucking. Respondents are 16 interstate trucking companies. Each of the petitioner benefit plans was created by a trust agreement entered into by multiemployer associations to which respondents belong and various local affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1] By the terms of the National Master Freight Agreement, a collective bargaining agreement to which the

[1] The trust agreements covering the Pension Fund and the Health and Welfare Fund are identical in all material respects. References hereinafter are to the provisions of the Pension Fund trust agreement, which is reproduced at Pet. App. A43-A49.

union and respondents are signatories, respondents are required to make weekly contributions to petitioners for each employee "covered by the agreement." An employee is "covered," irrespective of union membership, if he or she is employed in a particular job classification described in the collective bargaining agreement.[2] Respondents have expressly agreed to be bound by the trust agreements governing the petitioner funds. Pet. App. A1-A5, A16. Under the trust agreements, covered employees are entitled to certain benefits providing that they satisfy stated preconditions.

The trust agreements require each participating employer to make "continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement" (Art. III, § 1 (Pet. App. A44)). The agreements establish boards of trustees to administer the Funds and require the trustees "to demand and collect the contributions of the Employers to the Fund" and to "take such steps, including the institution and prosecution of * * * any legal proceedings as the[y] * * * in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of [employer] contributions * * * owed to the Trust Fund" (Art. III, § 4 (Pet. App. A45)).

In order to facilitate the trustees' performance of their collection and enforcement responsibilities, Article III, Section 5 of the trust agreements provides (Pet. App. A46):

> Each Employer shall promptly furnish to the Trustees, upon reasonable demand the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files * * *.

In addition, each employer is required to supply *(ibid.)*:

> such other information as the Trustees may reasonably require in connection with the administration of the Trust.

Article III, Section 5 of the trust agreements provides as well that (Pet. App. A46):

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[2] Respondents allege that 60% of their employees are not covered (Pet. App. A8, A94).

> The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.

The trust agreements provide that Fund trustees may construe the provisions of the trust agreements; any construction adopted by the trustees in good faith is binding on employers, the union and employees (Art. IV, § 17 (Pet. App. A27, A48)). Furthermore, by the terms of the collective bargaining agreement and implementing agreements providing for respondents' participation in the Pension and Health and Welfare Funds, respondents agreed to be bound by all actions of the Funds' trustees (Pet. App. A3-A4). Finally, the trustees are empowered by the trust agreements "[t]o do all acts, *whether or not expressly authorized herein*, which the Trustees may deem necessary or proper for the protection of the property held hereunder" (Art. IV, § 14(e) (emphasis added) (Pet. App. A27, A45, A47)). See generally *Schneider Moving & Storage Co.* v. *Robbins*, No. 82-1860 (Apr. 18, 1984), slip op. 4-5.[3]

2. In late 1979, petitioners contacted respondents to arrange a "periodic review[] of participating employer contributions for the benefit of Plan Participants and their Beneficiaries," including a "[d]etermination of eligible Plan Participants covered by Collective Bargaining Agreements" (Pet. App. A6-A7). During the course of this audit, in February and March 1980, respondents furnished petitioners' audit staff with only part of the information they requested. Respondents provided payroll registers for those employees whom respondents deemed covered by the collective bargaining agreement. In addition, respondents produced insurance exception listings, which are documents prepared monthly listing the individuals and time periods for which respondents acknowledged an obligation to make contributions to the trust funds. *Id.* at A85-A86.

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[3] The trust agreements involved in this case are the same ones interpreted by the Court in *Schneider Moving & Storage Co.*

Based on the limited information provided, petitioners' auditors discovered substantial reporting and contribution deficiencies, including respondents' failure to pay sums owed to the Funds totalling in excess of $268,000. Specifically, the auditors found that respondents had failed promptly to report newly-hired employees, had reported premature termination dates for departing employees, had failed to contribute for employees who worked part of a week during a strike, and had failed to contribute for employees who were on sick leave. The auditors also discovered four instances in which respondents had made contributions for an individual not listed on the various documents that purportedly contained the names of all covered employees. Pet. App. A7, A83-A84, A87. Despite petitioners' request, however, respondents refused to provide tax forms and complete payroll ledgers that included information regarding employees who respondents claimed were not covered (*id.* at A7, A86). At respondents' direction, the auditors left respondents' premises on March 28, 1980 without completing their audit (*id.* at A7, A88).

3. Petitioners commenced this action in the United States District Court for the Eastern District of Michigan pursuant to Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. 185(a), and Section 502 of ERISA, 29 U.S.C. 1132, alleging that respondents failed accurately to report, and to remit benefit fund contributions for, all employees covered by the collective bargaining agreement (Pet. App. A1-A2). The relief sought by the plan trustees included an injunction directing respondents to allow a complete audit of their payroll records in order to enable the trustees to verify that respondents had correctly reported all covered employees and had made all required contributions. Petitioners maintained that, without such an independent audit, they would be unable to ensure the financial integrity of the benefit funds or to fulfill their fiduciary obligations to the plans' participants and their beneficiaries. Pet. App. A2. The district court agreed, and held (*id.* at A8-A14) that petitioners had both a contractual right under various provisions of the trust agreements and a statutory obligation under ERISA to audit respondents'

payroll records "to independently verify the status and duties of all individuals employed by [respondents] in order to insure that proper benefit contributions are being made" (*id.* at A3).

4. The court of appeals reversed (Pet. App. A15- A34). The court initially held (*id.* at A18-A20) that ERISA does not itself afford petitioners any authority to audit respondents' records "to independently verify whether any given employee is covered by the collective bargaining agreements" (*id.* at A19). The court of appeals acknowledged that ERISA imposes broad fiduciary duties on benefit plan trustees. 29 U.S.C. 1104. The court reasoned, however, that because the Act also specifies that fiduciaries must act "solely in the interest of [plan] participants and beneficiaries," and must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" the Act (Pet. App. A19 (quoting 29 U.S.C. 1104(a)(1)), ERISA does not sanction exercise of auditing authority by the trustees. The court of appeals stated (Pet. App. A19-A20):

> [T]he provisions of ERISA require reference to the terms of the collective bargaining agreements and the trust agreements to determine who are the participants and beneficiaries to whom statutorily imposed duties are owed and to the terms of the trust agreements to determine what the precise nature of those duties are.

The court of appeals held, moreover, that the trust agreements did not authorize the trustees to undertake the audit contemplated, either. The court of appeals initially concluded that the trust agreements define the term "employees" to include only workers covered under the benefit plans and that the trustees' right under Article III, Section 5 to demand pertinent information on "employees" accordingly did not extend to persons other than those covered by the plans (Pet. App. A20-A26). Additional language in Article III, Section 5 that requires an employer to furnish other information reasonably required by the trustees, and to produce pertinent records for the trustees' examination (see pages 3-4, *supra*), was also dismissed as insufficient to

afford the trustees the audit authority claimed (Pet. App. A26). The court reasoned that this language " 'can only refer to information reasonably required as to "covered" employees additional to the records specifically listed'" (*ibid.*, quoting *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616, 619 (8th Cir. 1981)).

The court of appeals did recognize a contractual basis for the trustees' exercise of a tightly circumscribed auditing authority extending beyond records on persons conceded by an employer to be covered by the employee benefit plan (Pet. App. A27-A31). The court inferred that language in the trust agreements expressly mandating that trustees collect contributions owed by employers (see Art. IV, § 2 (Pet. App. A47)) and granting them power to protect trust assets by taking acts not otherwise explicitly authorized (see Art. IV, § 14(e) (Pet. App. 47)) required the trustees to "ensure that contributions to the Funds correlate with disbursement of benefits from them" (*id.* at A29). The court premised this conclusion in part upon the common law principle that "[p]owers may be inferred or implied from the terms of the governing instruments read as a whole, from an express directive to accomplish a particular goal unaccompanied by express directives on the ordinary and natural means of obtaining that result, and from the purposes of the trust" (*id.* at A28).

Notwithstanding this analysis, the court of appeals held that the trustees' auditing authority is "confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been * * * classified * * * as a covered employee" (Pet. App. A29). The court of appeals explained that the trustees' authority under the trust agreement is "limited * * * by ERISA" (*id.* at A27). The court believed that the trustees' statutory duties to administer the Fund exclusively in the interest of participants and other beneficiaries precluded them from reviewing employment records of non-covered employees (*id.* at A29). The court of appeals' conclusion appears to rest upon the view that it would be "arbitrary and capricious"—and thus

an imprudent expenditure of plan assets inconsistent with a fiduciary's obligations under ERISA—to undertake an audit designed to ferret out underpayments, absent reasonable cause to suspect that an employer has failed to make required payments in the case of a particular employee (*id.* at A29-A30).

The court of appeals also concluded that limiting the trustees' auditing authority to instances in which there is cause to believe that required contributions have not been made for an identified employee was consistent with traditional labor relations principles (Pet. App. A30-A31). The court observed that "[c]overage under the terms of a collective bargaining agreement has traditionally been within the province of the employer and union" (*id.* at A30). The court of appeals believed that limiting the trustees' audit authority "preserves the privacy [*sic*] and integrity of the grievance and arbitration provisions agreed to by [respondents] and the Union as a means of resolving questions of employee coverage" (*id.* at A31).

Applying the limited auditing right it had recognized, the court of appeals concluded that petitioners were entitled to review only respondents' records covering the four individuals as to whom respondents had made trust fund contributions without listing the individuals as covered (along with the records covering those employees respondents conceded to be covered). Any broader audit was deemed "outside of [the trustees'] statutorily and contractually imposed duties, express or implied, as a matter of law" (Pet. App. A32).

SUMMARY OF ARGUMENT

I

A. The court of appeals improperly limited petitioners' authority to conduct an audit of contributing employers' payroll records to assure that all contributions owed to the employee benefit plan are being paid. Recognizing the importance of pension and welfare plan benefits to the financial well-being of millions of persons, Congress required in ERISA that employee benefit plan assets be held in trust. Invoking established trust law doctrine, Congress sub-

jected plan officials to strict fiduciary standards of conduct. Among the implied fiduciary duties recognized under the law of trusts is the trustees' fundamental obligation to collect trust assets. This obligation, like those expressly established by the pertinent trust agreement, may be carried out both through powers explicitly conferred upon the fiduciary and through the trustees' inherent authority to use ordinary and natural means to obtain the results mandated by the trust.

B. An audit of a participating employer's payroll records is a reasonable and appropriate means of carrying out the trustees' obligation to collect all contributions due to the plan. Indeed, in light of the substantial opportunities that exist for misclassification or underpayment by employers, especially in multiemployer plans, such an independent check on the accuracy and completeness of an employer's coverage determinations must be available to plan trustees if they are to provide meaningful protection for plan participants. Generally accepted auditing standards and common sense support the view that an employer's omissions in listing covered employees and making contributions on their behalf can only be detected by audit procedures that look beyond records on those employees the employer concedes to be covered.

The legislative history of ERISA confirms the importance of plan trustees' auditing authority. Ensuring full funding of pension plan benefits through timely payment of employer contributions was one of the Act's principal objectives. Moreover, Congress recognized that special features of employee benefit plans—including the large number of participants and the inability of individual participants and beneficiaries effectively to guard their own interests—mandate that plan fiduciaries act vigilantly and vigorously to guard plans' financial soundness.

The court of appeals' justifications for departing from these principles are insubstantial. Review of payroll records necessary to detect covered employees whom a participating employer has failed to acknowledge is not inconsistent with the statutory requirement that fiduciaries act on behalf of beneficiaries and participants. Nor is a limitation

of auditing authority to employer payroll records on individuals as to whom there is already reasonable cause to suspect employer delinquencies consistent with, much less required by, fundamental notions of prudence. Audits that are carefully staged in conformity with generally recognized accounting procedures enhance, rather than threaten, plan assets.

C. The reporting and disclosure requirements of ERISA offer further evidence that plan trustees are vested with authority to independently verify the accuracy and completeness of employer contributions. Financial statements and schedules in annual reports that plan trustees are required to file with the Secretary must be certified as sound and accurate under generally accepted auditing standards. Those standards require assurance that a plan has disclosed all contributions due. The annual reports must also disclose the number of plan participants. Congress plainly understood that plan officials had the authority to verify data needed to meet these requirements. Indeed, 29 U.S.C. 1059 directly requires employers to provide trustees of multiemployer plans with information necessary to ascertain which of the employers' workers is covered by the benefit plan.

D. The court of appeals' decision frustrates ERISA's overriding objective: to assure the financial security of employee benefit plans. By design or mistake, participating employers sometimes fail to remit full contributions due on behalf of all participants. If these contribution deficiencies go undetected they can lead to inadequate funding of the plans involved. The court of appeals' ruling undercuts efforts to ensure proper funding by encouraging employers to refuse to cooperate with trustees performing their fiduciary duties.

II

Contrary to the conclusion of the court of appeals, the trust agreements in this case plainly grant petitioners the auditing authority they seek. The agreements provide that contributing employers must furnish the trustees with any information reasonably required in their administration of

the trust and must afford access to employer records when examination is deemed advisable by the trustees. Trustees may also undertake any action necessary to protect trust assets. Petitioners' interpretation of these provisions as providing for their exercise of audit authority is reasonable and should be sustained.

ARGUMENT

I. ERISA RECOGNIZES THE AUTHORITY OF EMPLOYEE BENEFIT PLAN TRUSTEES TO AUDIT A PARTICIPATING EMPLOYER'S PAYROLL RECORDS TO VERIFY THAT THE EMPLOYER IS MAKING ALL CONTRIBUTIONS THAT ARE DUE

A. ERISA Requires Trustees To Employ Prudent And Appropriate Means To Collect And Preserve Plan Assets

After extensive study of the operation and failings of private employee pension and welfare benefit plans, Congress enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* ERISA was designed to redress major deficiencies in plan functioning found to implicate "the continued well-being and security of millions of employees and their dependents" by establishing "minimum standards * * * assuring the equitable character of such plans and their financial soundness" (29 U.S.C. 1001(a)). Congress wished to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). Accord, *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, No. 83-245 (June 18, 1984), slip op. 2. To achieve this end, Congress required that "all assets of an employee benefit plan shall be held in trust" (29 U.S.C. 1103(a)). See S. Rep. 93-127, 93d Cong., 1st Sess. 29-30 (1973); H.R. Rep. 93-533, 93d Cong., 1st Sess. 11-13 (1973). In order "to make as certain as possible that pension fund assets would be adequate" to pay benefits due, Congress

also "prescribed standards of conduct for plan" fiduciaries (*Nachman Corp.*, 446 U.S. at 375).[4]

The fundamental standards of conduct for trustees are set forth in Section 404 of ERISA, 29 U.S.C. 1104. Congress required employee benefit plan fiduciaries to discharge their duties with respect to the plan "solely in the interest of the participants and beneficiaries" and with the "care, skill, prudence and diligence" that a prudent person "familiar with such matters" would employ if acting under similar circumstances. 29 U.S.C. 1104(a)(1). Congress also required fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as [they] are consistent with [ERISA]." 29 U.S.C. 1104(a)(1)(D).

In outlining the responsibilities of benefit plan fiduciaries, Congress deliberately declined to enumerate the powers and duties of trustees, choosing instead to invoke the common law of trusts. The House and Senate Reports each explain: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts" (S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 11). See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332-333 (1981). Thus, the trustees' statutory obligations to act in a prudent manner and with utmost fidelity to the interests of participants and beneficiaries are defined by reference to the duties and powers of trustees recognized in the common law.

The law of trusts recognizes fundamental fiduciary duties that arise by virtue of the trust relationship. Trustees have a common law duty to take necessary steps to preserve and maintain trust assets. G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 582 (rev. 2d ed. 1980) [hereinafter cited as Bogert]; 2 A. Scott, *The Law of Trusts*

[4] Congress was equally concerned that welfare benefit plans, which frequently pay benefits out of current contributions, be able to deliver promised benefits. See *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046 and H.R. 16462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st & 2d Sess. 471-472 (1969-1970).

§ 175 (3d ed. 1967). Acts traditionally deemed necessary to preserve trust assets include identifying the trust assets, holding the settlor to his obligation to deliver the assets, and asserting control over the assets. Bogert § 583, at 348-350, 355-356. Trustees also have a duty to investigate the identity of beneficiaries for the purpose of notifying them of gifts made for their benefit. Bogert § 583, at 348; see *Rosen* v. *Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir.), cert. denied, 454 U.S. 898 (1981).

Moreover, under the law of trusts made applicable to employee benefit plans by ERISA, the authority available to trustees to carry out their fiduciary duties includes not only the fiduciaries' express powers, defined by the instrument creating the trust, but also powers implied from the terms and purposes of the trust. Bogert § 551, at 3, 41. Among those implied powers is the trustee's authority to "use the ordinary and natural means" for obtaining the result dictated by the settlor. *Id.* § 551, at 41; Restatement (Second) of Trusts § 186 (1959); 3 A. Scott, *supra*, § 186, at 1496.[5]

B. An Audit Of A Participating Employer's Complete Payroll Records Is An Appropriate Means For Trustees To Ensure That The Employer Is Contributing On Behalf Of All Covered Employees

1. In order to fulfill their express statutory duty to act with fidelity to the interests of plan participants and beneficiaries, and their implied duties to collect trust assets and identify the beneficiaries, trustees must ensure that an employer is making appropriate contributions for all covered

[5] A trustee's duty to maintain trust property by ordinary and natural means gives rise to manifold diverse powers, each appropriate to particular circumstances confronted by the trustee. For instance, trustees have been held to possess authority to repair or improve property to preserve its value, to mortgage or lease real estate to raise needed revenue, and to maintain suit against the settlor or others to secure possession of the assets. See, *e.g.*, *Spooner* v. *Dunlop*, 87 N.H. 384, 180 A. 256 (1935); *Upham* v. *Plankinton*, 152 Wis. 275, 140 N.W. 5 (1913); *Home for Destitute Crippled Children* v. *Boomer*, 320 Ill. App. 541, 51 N.E.2d 830 (1944).

employees. Trustees of an employee benefit plan have an obligation to safeguard not only the interests of those employees who the employer acknowledges are covered, but also the interests of unidentified, but covered, employees for whom the employer is not making contributions. In addition, in a multiemployer plan, the trustees not only protect the interests of all participants, but effectively protect participating employers generally against liability for underfunding resulting from deficiencies in the contributions of any particular employer. In sum, benefit plan trustees have an unqualified "obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer." *NLRB* v. *Amax Coal Co.*, 453 U S. at 332, 337 (emphasis in original).[6] Accord, *Nedd* v. *United Mine Workers of America*, 556 F.2d 190, 212 (3d Cir. 1977); *Laborers Health & Welfare Trust Fund* v. *Kaufman*, 707 F.2d 412, 416 (9th Cir. 1983).

To fulfill these obligations, and to avoid effecting a prohibited extension of credit to an employer who is delinquent in his contributions (see 29 U.S.C. 1106(a)(1)(B)), trustees must develop "reasonable, diligent and systematic methods for the review of employer contribution accounts [including] field audits." Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976). Accord, *Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 Empl. Ben. Cas. (BNA) 1726, 1732 (D.D.C. 1982). Ultimately, trustees must "take action against employers who fail to contribute to the fund as required by the plan" (*Rosen* v. *Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d at 600).

An audit of a participating employer's payroll records is an ordinary and natural means for trustees to enforce the employer's obligation to contribute for each covered employee. See Prohibited Transaction Exemption 76-1, *supra*. Unless an employer's records disclosing the identity of employees and the nature of their employment are available for the trustee's examination, the trustees will be obliged to rely upon the good faith and the correctness of unilateral

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[6] As the Court emphasized in *Amax Coal Co.*, trustees may not "compromise the claims of the union or the employer with regard to the latter's contributions" (453 U.S. at 336).

employer determinations as to coverage under the collective bargaining agreement. Such unquestioning reliance is inconsistent with the fundamental statutory requirement that an employee benefit plan fiduciary act "solely in the interest of [plan] participants and beneficiaries" with the "care, skill, prudence and diligence" that a prudent person "familiar with such matters" would employ in the circumstances (29 U.S.C. 1104(a)(1)).[7]

One "familiar with such matters" would guide his performance of a trustee's fiduciary obligations with the knowledge that contributing employers, through inadvertence, mistaken legal interpretation or fraud, do not always remit complete and accurate contributions on behalf of all covered employees. See, *e.g.*, *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983); *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), petition for cert. pending, No. 83-421 (filed Sept. 12, 1983); *United States* v. *S & Vee Cartage Co.*, 704 F.2d 914 (6th Cir. 1983), cert. denied, No. 83-228 (Oct. 31, 1983). Moreover, a knowledgeable trustee would appreciate that general payroll audits can facilitate recovery of significant contribution delinquencies undetectable by any other means. See, *e.g.*, *Jim McNeff, Inc.* v. *Todd*, *supra* (audit revealed that employer owed more than $5,000 on behalf of five employees that employer had never reported as covered); *Laborers Health & Welfare Trust Fund* v. *Kaufman*, *supra* (audit indicated a discrepancy exceeding $130,000 due to controversy regarding covered or non-covered status of particular non-union labor); *Bugher* v. *Consolidated X-Ray Service Corp.*, *supra* (audit uncovered more than $100,000 due on behalf of covered employees who employer erroneously believed were not covered); *Audit Services Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981) (audit revealed deficiency of more than $25,000 due to employers' failure to contribute on behalf of non-union covered employees). Accordingly, a prudent employee benefit plan fiduciary would not unquestion-

[7] Cf. 29 U.S.C. 1110, which generally invalidates, as contrary to public policy, any provision of a trust agreement that purports to limit the responsibility of any fiduciary for the performance of any fiduciary "responsibility, obligation, or duty."

ingly accept the accuracy of an employer's coverage determinations.

Generally accepted auditing standards confirm that failure to recognize the audit authority of trustees of a multiemployer pension or welfare benefit plan cripples trustees' ability to identify and collect all assets owed to the plan in a manner consistent with fiduciary standards of care. For instance, completion of an independent audit of such a benefit plan requires that the auditor investigate and be assured of the accuracy of the plan's data on the number and identity of participants. Such assurance may be gained in part from an independent check of the employer's records, and in part from an assessment of the plan's own internal safeguards to make sure that all contributions due are paid. American Institute of Certified Public Accountants (AICPA), *Audits of Employee Benefit Plans* §§ 8.4, 10.6 (1983); AICPA, *Audits of Employee Health and Welfare Benefit Funds* 20-21 (1972); AICPA, *Statement on Auditing Standards No. 1*, at AU 320.01 (1972); AICPA, *Statement on Auditing Standards No. 9*, at AU 322 & AU 322.02 (1975). These professional auditing procedures reflect an elementary—but critical—auditing principle based, at root, upon common sense:

> The auditor should determine that the population [examined] is appropriate for the specific audit objective. For example, *an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items.* An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.

AICPA, *Statement on Auditing Standards No. 39* ¶17, at AU 350.17 (1981) (emphasis added). There is no reason to impute to Congress the intent to defy this common sense principle by rendering employee benefit plan fiduciaries accountable for collection of trust assets while denying them the authority needed to carry out that obligation.[8]

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[8] In fact, as explained below (see pages 22-23, *infra*), Congress generally required employee benefit plans to conform to the norms of the accounting profession in the conduct of their affairs.

2. The legislative history of ERISA provides additional evidence that the Act should be interpreted to recognize the authority of employee benefit plan trustees independently to verify that participating employers have made all contributions required of them under applicable trust agreements. Recognition of trustee auditing authority effectuates two of the major policy objectives that Congress intended to accomplish by enacting ERISA: reform of prevailing pension and welfare plan funding practices and maintenance of uniform and high standards of fiduciary responsibility for plan officials, employing the latter to advance the former. See S. Rep. 93-127, *supra*, at 9, 11; H.R. Rep. 93-533, *supra*, at 7.

The House and Senate Reports explain Congress's concern with assuring full plan funding (H.R. Rep. 93-533, *supra*, at 7; S. Rep. 93-127, *supra*, at 9-10):

> The pension plan which offers full protection to its employees is one which is funded with accumulated assets which at least are equal to the accrued liabilities, and with a contribution rate sufficient to maintain that status at all times.

Congress accordingly required that "[a]ll current accruals of benefits based on current service * * * be paid for immediately" (H.R. Rep. 93-533, *supra*, at 14). See 29 U.S.C. 1022. Congress recognized, moreover, based upon its study of pension plan failures, that one of the two leading causes of loss of individual benefit rights is "the manner in which * * * plan[s are] executed with respect to [their] contractual requirements of * * * funding" (S. Rep. 93-127, *supra*, at 5; H.R. Rep. 93-533, *supra*, at 5). In addition, Congress understood that individual employees are unable, as a practical matter, to safeguard their own pension and benefit rights (S. Rep. 93-127, *supra*, at 4; H.R. Rep. 93-533, *supra*, at 4). Thus, if the "full protection" Congress intended to provide is to be achieved, and the overriding goal of making "the private pension promise * * * real rather than illusory" attained (*id.* at 10), benefit plan fiduciaries—the only actors who are charged faithfully and singlemindedly to protect participants' interest—must have

effective means to verify the completeness and accuracy of employer contributions.[9]

The legislative history of ERISA also demonstrates that Congress was cognizant of the special attributes of employee benefit plans that distinguish them from typical trusts governed by state law. The Senate and House Reports observe that "conventional trust law" was "developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons)," whereas "the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature" (S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 12). Because of the large number of participants in a typical employee benefit plan, and the fact that the trust is intended to receive a continuous stream of contributions keyed to the number and identity of its employees and their functions, employee benefit plans predictably experience specia difficulty in assuring timely receipt of all of the assets to which they are entitled.

This is especially true of multiemployer plans because of the fluid structure of employment in many industries in which such plans are characteristically found. In industries such as construction and trucking, variability, brevity and uncertainty of job duration and the multiplicity of employers for some workers over the course of a year greatly multiply the opportunities for honest errors, mistaken judgments and outright fraud. See Bricklayers Fringe Benefit Funds Am. Brief in Support of the Petition 4-5. Congress's instruction that the "courts * * * interpret the prudent

[9] Congress also provided that, subject to carefully delineated exceptions, "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. 1103(c)(1). See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 303 (1974). Of course, the trustees' exercise of audit authority tends to effectuate this prohibition. Moreover, one of the statutory exceptions to this prohibition allows for the return to an employer of excess contributions resulting from a mistake of fact or law. 29 U.S.C. 1103(c)(2)(A). The court of appeals' decision in this case denies plan fiduciaries a comparable right to determine whether an employer has made *insufficient* contributions resulting from a mistake of fact or law.

man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans" (S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 12; H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 302 (1974)) thus dictates that the trustees of multiemployer plans be afforded auditing authority sufficient to enable them to verify the accuracy and completeness of employer contributions.

3.a. Contrary to the view of the court of appeals (Pet. App. A19, A29), checking an employer's records to verify that required contributions have been made for all covered employees, whether or not identified as such by the employer, is entirely consistent with the statutory directive that fiduciaries act solely in the interest of plan participants and beneficiaries. 29 U.S.C. 1104(a)(1)(A). Such an audit necessarily encompasses review of payroll records of persons who are not acknowledged by the employer to be covered, and will, as a practical matter, often entail examination of records of some persons who are not in fact covered. Still, the essential purpose of such an audit is to protect the interests of plan participants—both those who have erroneously been excluded by the employer in making contributions, and those who have been accurately identified as covered but whose interests are threatened by underfunding of the plan because of an employer's failure to make contributions in respect of all covered persons. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 465 (1977).[10]

[10] The court of appeals drew support for its conclusion that ERISA confers no auditing right upon trustees from the requirement of the statute that plan fiduciaries discharge their duties "*in* accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of . . . [ERISA]" (Pet. App. A19, quoting 29 U.S.C. 1104(a)(1)(D)). As we explain below (pages 26-29, *infra*), the particular trust agreements involved in this case support the auditing authority claimed by petitioners. But even the court of appeals, which read these agreements differently, did not seriously suggest that anything in these agreements directly *precluded* exercise of such auditing authority. Moreover, Section 1104 also requires plan fiduciaries to act under a prudent person standard (see page 12, *supra*) and to act with fidelity to the interests of participants and beneficiaries, while Section 1104(a)(1)(D)

b. Equally incorrect is the court of appeals' categorical judgment (Pet. App. A29-A30) that a prudent fiduciary is prohibited from undertaking an audit extending beyond the records of those individuals conceded to be covered and those other identifiable individuals the trustees have reasonable cause to believe are covered.[11] This limitation robs

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subordinates any contractual requirements to the other commands of the statute. The legislative history emphasizes that this statutory override was designed to void provisions that limit a fiduciary's otherwise applicable duties. S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 12. Thus Section 1104(a)(1)(D) does not support the court of appeals' conclusion that ERISA confers no auditing authority on trustees.

[11] The court of appeals stated that the Secretary of Labor's ERISA investigations are circumscribed by a "reasonable cause" requirement and reasoned that benefit fund trustees should not be afforded any greater latitude than the Secretary (Pet. App. A30 & n.5). The court of appeals misread the statute. Although the Secretary needs "reasonable cause" to enter the premises of a plan or employer pursuant to 29 U.S.C. 1134(a)(2), the Secretary has the unqualified authority under 29 U.S.C. 1134(a)(1) to "require the submission of reports, books, and records" in connection with an investigation. See, *e.g.*, *Donovan* v. *National Bank of Alaska*, 696 F.2d 678, 684-685 (9th Cir. 1983); *Donovan* v. *Shaw*, 668 F.2d 985, 990 (8th Cir. 1982). The requirements of the two subsections plainly are not interchangeable. Cf. *Donovan* v. *Lone Steer*, No. 82-1684 (Jan. 17, 1984), slip op. 6-7.

At the same time, somewhat paradoxically, the court of appeals also suggested that the interests of employees for whom contributions are not being made can be adequately protected by the Secretary of Labor (Pet. App. A33). Although we take a broader view of the Secretary's investigative authority than the court of appeals did, we cannot agree that Congress intended that the Secretary's investigative authority be the exclusive—or even the primary—instrument for verifying the completeness of employer contributions. Indeed, Congress expressly withheld from the Secretary authority to bring suit to collect delinquent employer contributions due to a multiemployer plan. See 29 U.S.C. 1132(b)(2), 1145. Because the authority to pursue such delinquencies, once discovered, rests with plan trustees, it is unlikely that Congress withheld complementary auditing authority from trustees. The Secretary has informed us that approximately 900,000 benefit plans file annual reports with him. Between 11,000 and 12,000 of these are multiemployer plans. It is thus wholly unrealistic to suggest that centralizing all auditing authority in the Secretary would provide protection to benefit plan participants comparable to that afforded by trustee audits.

the trustees' auditing authority of the ability to uncover previously unsuspected delinquencies in contributions.[12] It would reward concealment of such delinquencies and would, contrary to fundamental precepts of fiduciary responsibility, force trustees to rely heavily upon the probity and accuracy of determinations made by contributing employers. The court of appeals' decision thus is irreconcilable with Congress's desire to use duties and standards derived from the common law of trusts "to make as certain as possible that pension fund assets would be adequate" to pay benefits due (*Nachman Corp.*, 446 U.S. at 375). It constrains plan trustees from employing reasonable means that are well-suited to the performance of their fiduciary duties.[13]

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[12] If trustees' auditing authority is limited to suspected delinquencies it does relatively little to complement and support the trustees' authority to enforce contribution requirements through legal proceedings. Under 29 U.S.C. 1132 plan fiduciaries are authorized to bring suit to collect delinquent contributions, and may also seek "such * * * equitable relief as the court deems appropriate." Certainly when the trustees have reasonable cause to suspect delinquencies they may file an action under this provision and the district court may direct that an audit be completed. But litigation to collect delinquent contributions may not be commenced without cause to believe that there is "good ground to support it." Fed. R. Civ. P. 11; see *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 24 n.12 (Burger, C.J., dissenting). Section 1132 thus presumes that plan fiduciaries have means to discover delinquencies that will enable them to avail themselves of an enforcement action.

[13] The court of appeals' speculation (Pet. App. A29-A30) that the proposed audit would pr ve unacceptably expensive is unfounded. Under generally accepted auditing standards, auditors would restrict their initial investigation to a small statistical sample of the total universe of employees. A more extensive sample would be reviewed only if the initial audit revealed significant problems with the employer's reporting. See AICPA, *Audits of Employee Benefit Plans*, *supra*, §§ 10.5, 10.6. Moreover, if a plan's independent auditor, whose unqualified opinion must be included in the plan's annual report to the Secretary (see pages 22-23, *infra*), cannot rely on the plan's own methods for verifying completeness of contributions, the independent auditor would itself be required to verify that information with the employer. Thus, whatever expense may be associated with a prudently delimited audit simply cannot be avoided. In any event, the court of appeals completely overlooked the enhancement of plan assets that

4. The tension between the critical role that Congress expected plan fiduciaries to play in assuring the financial soundness of benefit plans and the restricted scope of the auditing authority recognized by the court of appeals is exacerbated by the court's extremely restrictive application of the "reasonable cause" standard it announced (see page 7, *supra*). Surely, when an audit limited to payroll records of concededly covered employees uncovers significant employer contribution deficiencies, as it did in this case, prudence dictates that further auditing be undertaken to verify whether contributions are being made for all covered employees. Even if particularized suspicion were required, petitioners' trustees had ample reason to investigate further here.

C. Other Provisions Of ERISA Demonstrate That Congress Intended That Plan Trustees Be Permitted To Audit A Participating Employer's Payroll Records

Under ERISA Congress imposed stringent reporting requirements on employee benefit plan trustees in order to enable participants and beneficiaries, as well as the Secretary of Labor, to ensure that trustees fulfill their duties. "[T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection." S. Rep. 93-127, *supra*, at 27; H.R. Rep. 93-533, *supra*, at 11. Several of the specific reporting and disclosure requirements imposed upon employee benefit plans independently confirm that Congress expected such trustees to be able to audit employer payroll records to verify the accuracy of employer identification of covered employees.

First, in order to permit "better assessment of * * * plan[s'] financial soundness by administrators and participants alike" (S. Rep. 93-127, *supra*, at 28), ERISA requires that the annual reports of employee benefit plans filed with the Secretary of Labor include the opinion of an independent public accountant as to whether the financial statements contained in the report are accurate and pre-

typically results from meticulous enforcement of employer contribution requirements. See pages 5, 15, *supra*.

sented "in conformity with generally accepted accounting principles." 29 U.S.C. 1023(a)(3)(A). To provide a foundation for rendering such an opinion, the independent auditor is to undertake "such tests of the books and records of the plan as are considered necessary" under "generally accepted auditing standards" *(ibid.)*. If the independent accountant presents a materially qualified opinion, the Secretary may reject the annual report and order a second audit or bring an enforcement action against the plan. 29 U.S.C. 1024(a)(4)(B), (5)(A) and (C).

As explained above (page 16, *supra*), generally accepted auditing standards require that employer records be available to confirm the accuracy of coverage determinations and the adequacy of plan funding, particularly in the case of an audit of a multiemployer plan,[14] If neither the employee benefit plan's internal auditor nor the independent auditor has access to employer payroll data, the independent auditor generally will be obliged to express a qualified opinion or to disclaim an opinion (AICPA, *Audits of Employee Benefit Plans*, *supra*, § 12.17), thereby rendering the plan's annual report subject to rejection by the Secretary. It is thus essential for plan operation under ERISA that employer records needed to verify the completeness of the employer's contributions be available for audit. Plainly Congress expected that plan fiduciaries and their auditors would be able to undertake such examinations.

The same conclusion follows from 29 U.S.C. 1023(c)(1). Under that section, the annual report required to be filed with the Secretary of Labor by the plan administrator must

[14] In preparing an opinion for a plan's annual report, an independent accountant must determine whether the plan has properly assessed all employer contributions due. In doing so the accountant considers "[w]hether covered employees have been properly included" in employers' contribution reports. AICPA, *Audit of Employee Benefit Plans*, *supra*, §§ 8.2(a), 10.2(a). In assessing a multiemployer plan's identification of covered employees, "the [independent] auditor may need to make special arrangements to examine employer records" (*id.* § 8.4) including "testing whether the data maintained [in the fund's files] correspond to the data maintained in employer payroll and personnel files" (*id.* § 10.5(d)).

reflect the number of employees covered by the plan. Congress unquestionably understood that plan fiduciaries would have access to the information and records necessary to determine that figure reliably and independently.

Finally, 29 U.S.C. 1059 mandates that such employer records be open to plan fiduciaries. Under Section 1059(a)(1) and (2) (emphasis added), an employer participating in a multiemployer plan is required to "furnish to the plan administrator the information necessary for the administrator to maintain" records "with respect to *each* [of the employer's] employees sufficient to determine the benefits due or which may become due to such employees." This requirement obviously would not be satisfied if the information provided by an employer—or the records maintained by the plan—were limited to persons an employer concedes to be covered.[15] In addition, Section 1059(a)(1) and (2) requires each employer to "furnish to the plan administrator the information necessary" to enable the administrator to render a report "to each employee who is a participant under the plan" stating the extent of his accrued benefits thereunder, whenever such a report is requested or in certain other circumstances. Like Section 1023(c)(1), Section 1059 necessarily assumes that plan fiduciaries will have access to information necessary to enable them correctly to determine the identity of plan participants.[16]

D. The Court Of Appeals' Decision Is Inimical To The Objectives Of ERISA

In enacting ERISA, Congress sought to assure that participating employees and their beneficiaries would have fiscally sound benefit plans available to them. See *Pension*

[15] The term "employee" as used in ERISA is defined to include all persons working for an employer. 29 U.S.C. 1002(6).

[16] Employers that falsify information that plans must use in meeting their reporting requirements may incur criminal penalties under 18 U.S.C. 1027. See *United States* v. *S & Vee Cartage Co.*, *supra*. In addition, a civil penalty of $10 is payable to the Secretary for "each employee" with respect to whom an employer fails to furnish information required to be supplied under Section 1059(a). 29 U.S.C. 1059(b). Plan fiduciaries' exercise of auditing authority assists in the enforcement of these penalty provisions.

Benefit Guaranty Corp. v. *R.A. Gray & Co.*, slip op. 1-2. Congress recognized that employer contribution delinquencies pose a serious threat to the financial soundness of multiemployer plans. See, *e.g.*, 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson).[17] Audits of employer records by plan fiduciaries to verify that all contributions due have been remitted are an invaluable tool for detecting employer delinquencies before plan soundness is substantially undermined.

Accordingly, the decision below, if affirmed, will have a substantial deleterious impact upon the administration of employee benefit trust funds and will create substantial uncertainty for fiduciaries as to the scope of their obligations. As indicated above, the court of appeals' decision sharply restricts the tools available to employee benefit plan trustees to carry out their responsibilities—responsibilities Congress deemed essential to the "continued well-being and security of millions of employees" (29 U.S.C. 1001(a); see also 29 U.S.C. 1001a(a)(3)).

The court of appeals' decision also will exacerbate the fiscal problems that affect multiemployer plans because of employer contribution delinquencies by hindering trustees' ef-

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[17] Representative Thompson, one of the floor managers of the Multiemployer Act, described the various kinds of problems presented by such delinquencies (126 Cong. Rec. 23039 (1980)):

> Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies * * *.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, * * * uncollected delinquencies can add to the unfunded liability for all employers.

Accord, Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 43-44 (Comm. Print 1980).

forts to assure that such plans receive all contributions due. Pension plans must pay benefits to eligible participants and beneficiaries whether or not the employer has made required contributions to the plan on behalf of the particular employees. *Van Gunten* v. *Central States*, 672 F.2d 586, 589 (6th Cir. 1982).[18] Accordingly, undetected contribution deficiencies, however caused, can result in underfunding of plans and threaten the interests of those who depend on them.

Finally, the court of appeals' decision inevitably will encourage employer resistance to audits and will make funding delinquencies substantially harder to detect—especially before they have ripened into serious financial difficulty for a plan. Trustees who lack authority to audit general payroll records must depend on the employer voluntarily to provide the information needed to assure that contributions are being made for all eligible employees. The decision below thus will frustrate the efforts of plan trustees to fulfill their fiduciary duties, create confusion as to the extent of their obligations, and breed litigation. The decision may also discourage trustees from exercising the utmost diligence in protecting the interests of all persons entitled to benefits under employee benefit plans.

II. THE TRUST AGREEMENTS AUTHORIZE PETITIONERS' TRUSTEES TO AUDIT RESPONDENTS' PAYROLL RECORDS TO ENSURE THAT ALL REQUIRED EMPLOYEE BENEFIT PLAN CONTRIBUTIONS HAVE BEEN MADE

1. Based on the foregoing considerations, we conclude that Congress contemplated that employee benefit plan trustees have the authority to verify the sufficiency of em-

[18] See also Dep't of Labor Advisory Op. No. 76-89 (Aug. 31, 1976) (Pet. App. A70-A71). We know of no support for the court of appeals' speculation (Pet. App. A33-A34) that a covered employee on whose behalf no contributions were made might be estopped from claiming benefits under a plan. The legislative history of ERISA makes clear that Congress rejected any suggestion that individuals should lose their benefits because of their neglect to uncover an employer's failure to make required contributions on their behalf. See page 17, *supra*.

ployer contributions. But even if there were doubt as to whether ERISA itself should be read to *confer* authority upon benefit plan trustees to undertake such audits, the court of appeals' view that provisions of ERISA should be read to *limit* the contractual grant of authority contained in the trust agreements in this case would be wholly untenable. As we have indicated above, verification of an employer's coverage determinations is not inconsistent with either the prudent person standard of care or the statutory requirement of fidelity to the interests of covered persons. Thus, ERISA requires at a minimum that the provisions of a trust agreement that authorize trustees to enforce the contribution obligations of the employer be given a liberal, commonsense interpretation that will enable the trustees to fulfill their role as guardians of all participants' interests.

Read in this manner (or, indeed, read literally), the access-to-records provisions of the trust agreements, Article III, Section 5 (see pages 3-4, *supra*), make clear that the trustees are not limited to examination of records of employees either who are acknowledged by the employer to be covered or who the trustees have reasonable cause to believe have been erroneously excluded. The trust agreements expressly require participating employers to provide the trustees not only with information on covered employees, but also with "such other information as the Trustees may reasonably require in connection with the administration of the Trust." The agreements further authorize the trustees to examine "the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust" (Pet. App. A46).

This contractual language is sweeping and unqualified; trustees' access to employer records turns simply upon the *trustees'* assessment that examination thereof would be "*advisable*" in connection with the performance of their duties. In light of the breadth and the structure of the contractual language, and the fact that uncertainty and disputes as to coverage of particular individuals are a fixture of pension plan operation, this language can only be fairly

read to authorize the trustees to review employer documents necessary to confirm independently that all contributions due have been made. Certainly, the trustees' interpretation of the trust agreements as conferring auditing authority upon them is neither arbitrary nor unreasonable and is plainly consistent with the language of the agreements. Accordingly, under Article IV, Section 17 of the trust agreements (see page 4, *supra*), that interpretation is binding upon respondents. See *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir, 1968); *Miniard* v. *Lewis*, 387 F.2d 864 (D.C. Cir. 1967); see also Art. III, § 4 & Art. IV, § 14(e) (quoted at pages 3-4, *supra*).

In *Schneider Moving & Storage Co.* v. *Robbins*, No. 82-1860 (Apr. 18, 1984), this Court read Article III, Section 5 of the trust agreements at issue here in precisely the manner we advocate (slip op. 5 (footnote omitted)):

> To ensure compliance with the contribution requirements, the trust agreements gave the trustees the authority to examine [the employers'] payroll records. If the trustees determined that [the employers] were not complying with their contribution requirements, they had the authority under the trust agreements to initiate legal proceedings to enforce those requirements * * *.

The Court thus indicated that, contrary to the view of the court of appeals in this case, the trustees' audit authority is available for the purpose of *uncovering* an employer's failure to make required contributions, and not merely to confirm suspected delinquencies.

2. The court of appeals' decision conflicts with *Schneider Moving & Storage Co.* in another significant respect as well. Contrary to the court of appeals' analysis (see page 8, *supra*), this Court squarely rejected the premise that petitioners' trustees are obliged to rely upon the union or the arbitration mechanism provided in the collective bargaining agreement to enforce the contribution obligations of participating employers (slip op. 8-12). To be sure, the court of appeals did not completely subordinate the trustees' enforcement responsibilities to the labor-management arbitral process here. But the court of appeals' reasoning that the auditing authority of trustees should be limited so

as to defer to that process (see Pet. App. A30-A31) is inconsistent with this Court's recognition (slip op. 11) that the interests of the trustees and the union are not congruent. In any event, the effect of limiting the trustees' authority to cases where a concrete controversy exists as to the coverage of an identified employee is quixotic. So confined, the trustees' audit authority affords no protection to their distinctive interest in uncovering unsuspected delinquencies, while it tends to duplicate the union's role in resolving identified controversies as to particular employees.

Here, as in *Schneider Moving & Storage Co.*, slip op. 9, it is "unreasonable to infer that these parties [to the trust agreements] would agree to subordinate" the trustees' enforcement authority to the procedures specified for resolution of other kinds of disputes under collective bargaining agreements between employers and the union. No evidence of any such intention has been adduced.[19]

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[19] The court of appeals' statement that its restrictive interpretation of the trustees' audit authority under the trust agreements "preserves and promotes confidentiality of non-covered employee records" (Pet. App. A31) is difficult to comprehend. Neither the court of appeals nor respondents have suggested that non-covered employees have any legal right that bars the trustees' examination of a participating employer's payroll records. Moreover, there is no reason to believe that trustees' access to employer records threatens the interests of non-covered employees; once trustees have verified the identity of non-covered employees, payroll information on non-covered employers will be of no interest or use to them. Finally, an employee benefit fund trustee is a fiduciary, charged to act exclusively in the interests of plan participants and beneficiaries and to "overcome any loyalty to the interest of the party that appointed him" (*NLRB* v. *Amax Coal Co.*, 453 U.S. at 334). Thus no trustee could properly employ payroll data relating to non-covered employees in a manner hostile to the interests of such employees—or those of the employer. Cf. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) (employer's duty, under the NLRA, "to provide information that is needed by the bargaining representative for the proper performance of its duties"). In any event, an employer's confidentiality concerns may be met by expressly requiring data on non-covered employees to be held in confidence and by restricting records produced for the trustees' audit to use in the performance of the trustees' fiduciary duties. It is at least arguable that such a limitation is found in Article III, Section 5 of the trust agreements,

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1984

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which grants access to records only "in connection with the proper administration of the Trust" (Pet. App. A46).

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No. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

AND

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2157

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* urging reversal of the decision below. Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF THE NCCMP

Multiemployer plans are created and funded pursuant to collective bargaining agreements and such plans receive contributions from more than one employer. The

NCCMP is a nonprofit, tax-exempt organization formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA")[1] to participate in the development of employee benefit legislation and the government regulations under ERISA and other laws affecting multiemployer plans. More than 140 multiemployer plans and related international unions, but not the particular unions or plans involved in this case, are affiliated with the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than eight million workers. The decision below has far-reaching, adverse consequences for all multiemployer plans and, therefore, is particularly untoward for the NCCMP affiliates which represent the vast majority of participants in such plans.

Because of the broad range of experience of the NCCMP's constituent organizations and its close ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is qualified to provide the Court with insight concerning the practical implications of the decision below for multiemployer plans and to state the position of the trustees, participants, and beneficiaries of such plans. In fact, the NCCMP has recently participated as an *amicus curiae* in both *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 52 U.S.L.W. 4810 (1984) and *Jim McNeff, Inc. v. Todd*, 103 S.Ct. 1753 (1983).

The NCCMP urges this Court to reverse the decision below that trustees can no longer independently ascertain the identity of their plan participants, but must delegate this fiduciary duty to adversely interested parties over whom the trustees have no control. That decision, if left unreversed, will have broad, adverse consequences on the financial soundness of the NCCMP's affil-

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[1] ERISA was substantially amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (1980).

iated employee benefit plans and, therefore, upon the plans' ability to provide benefits.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE NCCMP

The NCCMP's brief focuses on issues which it believes may not be adequately presented elsewhere, including:

(a) The particularly adverse impact that the holding below will have on national employee benefit policy and the multitude of multiemployer plans represented by the NCCMP; and

(b) The fundamental conflict between decisions of this Court, as well as those in other federal circuits, and the decision of the court below.

The NCCMP, therefore, moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief *amicus curiae* to urge the Court to reverse the holding below that multiemployer plan trustees may not conduct an audit of pertinent payroll records of all employees of a participating employer in order to determine whether the employer is fulfilling its legal obligation to make contributions on behalf of, and in the proper amount for, participants in a multiemployer plan.

I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth in this brief, the NCCMP submits that the decision below offends the national employee benefits policy established by Congress and recognized by this Court. Consequently, the lower court's decision will have a significant adverse effect upon the nation's multiemployer plans and the retirement security of more than eight million plan participants and beneficiaries.

The NCCMP is concerned that the failure to reverse the lower court's decision may undermine both the independence and neutrality of multiemployer plan trustees and the financial integrity of such plans. Trustees would no longer be able to determine on an ongoing basis whether employer contributions were being made on behalf of covered employees. Rather, only after an employee applied for benefits or requested an accounting of trust assets would trustees be able to determine whether that employee was an eligible participant to whom such financial disclosure must be made and whether contributions should have been made on his/her behalf. Yet, trustee failure to make an accurate accounting of plan assets—including contributions due—to plan participants and to the federal government can subject the trustees to statutory sanctions. And, trustee failure to attempt to collect contributions may constitute a prohibited transaction, actionable under ERISA. The lower court's ruling, by eviscerating the authority of trustees, threatens the very foundation of multiemployer plans—their financial base.

II. THE NATURE OF MULTIEMPLOYER PLANS

The multiemployer plan involved in this proceeding and the typical plan affiliated with the NCCMP have many characteristics in common. They are established

and maintained pursuant to the collective bargaining process, and they cover workers in broad geographical areas. These plans, too, are subject to legal constraints in three respects important to the issues raised by the lower court's ruling:

(i) all employees covered by the relevant provisions of the applicable collective bargaining agreements are also covered by the plan, subject only to the plan's eligibility requirements;

(ii) contributing employers must make payments on behalf of all their covered employees; and

(iii) benefits from pension plans have been held to be payable by the plan to covered employees whether or not the requisite employer contributions have been made to the plan.

These obligations serve to assure that the maximum number of eligible employees receive from a properly funded plan the benefits for which they labor.

A financially sound plan, and one operating within the confines of law, requires a proper actuarial relationship between employer contributions and employee benefits. The necessary predicate to maintaining the legally mandated financial integrity of pension plans is the implementation of an ongoing system to monitor plan assets—including plan contributions—and plan liabilities, i.e., identifying how much and to whom benefits will be paid.

Employer desires to minimize expenses, including payments to employee plans, are in constant tension with plan needs to maximize the collection of contributions. Therefore, it is the typical practice of trustees of plans, like those in this proceeding and those affiliated with the NCCMP, to establish strict auditing procedures which seek to ensure employer compliance with both plan and

statutory reporting and contribution provisions.[1] It has been the experience of the NCCMP affiliates that two discrete types of monitoring procedures are generally conducted: delinquency audits and systematic audits.[2] Delinquency audits are the result of known or suspected failures or refusals of employers to properly report or contribute. On the other hand, systematic audits are conducted because trustees have garnered extensive experience in administering plans and know that occasional spot-checking of employers' records is the only reasonable method for ensuring that what is essentially an honor system of employer self-reporting in fact remains honest.

It cannot be said that a procedure for systematic audits is created out of overabundant caution or needless worry. Manifest and reasonable cause for trustees to systematically audit employers is amply demonstrated by the countless litigated cases in which employers have

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[1] The Department of Labor and the Internal Revenue Service take the position that

> [p]lans which do not establish and implement collection procedures which are reasonable, diligent and systematic may be found to be engaging in prohibited transactions under sections 406 and 407(a) of the Act and section 4975(c)(1) of the Code in failing to collect delinquent contributions.

Joint Labor Department, IRS Notice on Class Exemptions from Prohibited Transactions for Multiemployer and Multiple Employer Plans (Prohibited Transaction Exemption 76-1), 41 *Fed. Reg.* 12740 (March 26, 1976), *reprinted in* PENS. PLAN GUIDE (CCH) at ¶ 16,602. *See,* Department of Labor Advisory Opinion 78-28A (Dec. 5, 1978), *reprinted in* PENS. REP. (BNA), No. 221 at R-25 (Jan. 8, 1979).

[2] The court below refers to systematic audits as "random audits." However, the process of selecting the target for such an audit is not "random" in the statistical sense. Rather, once the determination is made to conduct systematic audits, the selection process is the result of a considered decision by plan trustees to audit, for example, employers in one segment of an industry, employers in a particular location, or employers over a certain size.

sought to deny or evade their obligations to contribute on behalf of any or all of their employees. Moreover, this legion of cases in part stimulated the deep Congressional concern that resulted in the passage of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (1980), wherein the Congress expressed its intent to simplify and expedite the collection of unpaid contributions by multiemployer plan trustees. *See*, 29 U.S.C. § 1145; *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 92-99 (Brennan, J., dissenting) (1982). The decision below is, quite simply, a frustration of that Congressional intent.

III. SUMMARY OF REASONS FOR REVERSAL

A. Consistent with established Congressional policy, this Court has declared that employee benefit plan trustees have an absolute duty of loyalty to plan beneficiaries and the exclusive authority to control plan administration. *See, NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-33 (1981). To fulfill these responsibilities, this Court has consistently recognized the right of those trustees to calculate and collect employer contributions due the employee benefit funds. *See, Jim McNeff, Inc. v. Todd*, 103 S.Ct. 1753 (1983); *NLRB v. Amax Coal Co., supra*; *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *United States v. Carter*, 353 U.S. 210 (1957). The independent right of trustees to ascertain the identity of trust participants and beneficiaries is a fundamental prerequisite to the discharge of all fiduciary duties found at common law; all such duties which are detailed in the Employee Retirement Income Security Act ("ERISA"); and those fiduciary duties which have been interpreted by the federal judiciary. *Accord, Jim McNeff, Inc. v. Todd, supra; Chicago M. & St. P.R. Co. v. Des Moines U.R. Co.*, 254 U.S. 196, 208 (1920); 2 SCOTT ON TRUSTS §§ 170, 171 (3d ed. 1967). Yet, contrary to these fundamental principles, the Court below denied the trustees

the independent right to conduct an audit of the pertinent records of all the employer's employees in order to verify on whose behalf and in what amount the employer must contribute.

Additionally, the funding of employee benefit plans, like the federal income tax structure, is based on a system of self-reporting. Systematic audits are the keystone of financial integrity in both instances. Therefore, in order to satisfy their fiduciary duties, trustees must continue to attempt to conduct such audits, because they have been found to be the most effective and reasonable means of protecting the interests of the millions of workers who look to these trusts for benefits. Hence, the limitations on trustees imposed by the court below create a recurring problem for those who administer multiemployer plans.

B. The lower court, straining logic and ignoring economic reality, delegated to the employer the trustees' duty of identifying actual and potential trust beneficiaries by limiting the scope of the trustees' audit only to those employees who the employer asserted were entitled to the benefits of the plan. This delegation of trustee authority is contrary to the reasoning of this Court in *NLRB v. Amax Coal Co.*, *supra*, and *Jim McNeff, Inc. v. Todd*, *supra*; it is contrary to the express dictates of ERISA, *see*, 29 U.S.C. §§ 1103, 1104, 1105(c), 1106, 1110; and it stands in direct conflict with decisions in the federal circuits, including the Sixth, interpreting the duties of trustees *see*, *Van Gunten v. Central States, Etc.*, 672 F.2d 586 (6th Cir. 1982); *Rosen v. Hotel & Restaurant Emp., Etc.*, 637 F.2d 592, 600 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981); *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Nichols v. Trustees of Asbestos Workers Pension Plan*, 3 EBC 1726 (D.D.C. 1982).

Absent a uniform rule enunciated by this Court, trustees will be whipsawed between the denigration of their authority by the court below and the ultimate responsibilities imposed on them in all the circuits, including the Sixth. *See, Van Gunten v. Central States, Etc., supra.*[3]

IV. REASONS FOR REVERSAL

A. Multiemployer plan trustees must have an independent right to ascertain the identity of trust beneficiaries by means of systematic audits.

1. This Court long ago held that in order to create a trust there must be reasonable certainty as to the purpose, the property, and the beneficiaries. *Chicago M. & St. P.R. Co. v. Des Moines U.R. Co., supra.* The purpose of multiemployer benefit trusts and the policy underlying the statute which regulates those trusts are one and the same: to protect the interests of participants and to ensure the receipt of promised benefits. *See,* 29 U.S.C. §§ 186(c)(5), 1001(b).

The property of such employee benefit trusts consists initially of employer contributions, which employers have a statutory obligation to pay. 26 U.S.C. § 412 and 29 U.S.C. §§ 1082, 1145. Moreover, ERISA "vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone, and not the employer or the union. 29 U.S.C. § 1103(a)." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 333 (1981). The beneficiaries of these trusts are employees who satisfy plan eligibility requirements.

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[3] Ironically, the Sixth Circuit recently held in *Van Gunten v. Central States, Etc., supra,* that the selfsame pension plan which is the subject of the instant case must pay benefits to a participant even though an employer has failed to make the requisite contributions on behalf of that participant.

2. With respect to multiemployer pension plans there is no question but that trustees make the initial determination of whether an employee is a beneficiary at that point in time when the employee retires and applies for a pension. Furthermore, the fact that an employer has wrongfully failed to make contributions on behalf of an employee-beneficiary has been held not to form the basis for trustee refusal to pay the benefit, because the entitlement and amount of the pension is a function of hours worked, not hours worked for which contributions were paid. *See, Van Gunten v. Central States, Etc., supra.* Therefore, the trustees, upon whom Congress has imposed a fiduciary duty to maintain the financial integrity of the trust, must have an ongoing mechanism to determine on which employees' behalf and in what amounts employers must make contributions. *See, NLRB v. Amax Coal Co., supra,* 453 U.S. at 336-337; *Adams v. N.J. Brewery Emp. Pen. Trust Fund, Etc.,* 670 F.2d 387, 397 (3d Cir. 1982); *Rosen v. Hotel and Restaurant Emp., Etc., supra,* 637 F.2d at 600. Anything less than a comprehensive system for monitoring, recording and crediting contributions with accuracy would not be what "a prudent man acting in a like capacity and familiar with such matters" would do. 29 U.S.C. § 1104(a)(1)(B). *See, Nedd v. United Mine Workers of America, supra; Nichols v. Trustees of Asbestos Workers Pension Plan, supra.*

Nonetheless, the court below denied the trustees the right to conduct a systematic audit of pertinent records of all the employer's employees in order to ascertain whether the employer was properly reporting and contributing on behalf of all eligible employees. The court left the trustees at the mercy of employers by holding that an employer was entitled to limit the scope of the audit to the pertinent records of employees, who the employer—and only the employer—asserted were covered by

the plan. Thus, the more egregious the employer's failure to report to the trust on behalf of eligible employees, the more limited the scope of the audit.

The danger of such a situation is illustrated in the case of *Jim McNeff, Inc. v. Todd, supra*, where this Court found an employer obligated to contribute on behalf of employees pursuant to a valid prehire agreement, and where the employer had consistently reported that it had no covered employees. It was precisely because of a plan audit that the trustees were able to verify that certain employees were in fact participants in the trust on whose behalf contributions were legally required. Yet, under the holding in the instant case the trustees in *Jim McNeff, Inc. v. Todd* could not have conducted such an audit, because the employer asserted that none of its workers were covered employees. Therefore, although this Court has held that employers must contribute and trustees must collect those contributions, the decision below blindfolds trustees in the performance of their legal duty.

3. The court below failed to appreciate that the funding of multiemployer plans, like the federal income tax structure, is based on a system of self-reporting and that "it would be naive to ignore the reality that some persons attempt to outwit the system. . . ." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). Just as the tax investigatory system of audits prevents the dishonest and erring from escaping taxation and shifting heavier burdens to honest taxpayers, so, too, does a pension fund's audit program prevent employers from avoiding their contribution obligation, thereby diluting the financial stability of the trust and shifting the burden to complying employers. Monitoring compliance by systematic audits in both situations has long been found to be reasonable, prudent, and the most effective tool for monitoring fiscal integrity. *Accord, United States v. Bisceglia, supra; Donaldson v. U.S.*, 400 U.S. 517 (1971).

4. The court below held out to the trustees the possibility of broadening the scope of the audit to include the records of particular employees, who the trustees have reasonable cause to believe should have been reported by the employer. Though characterized as a "reasonable cause" requirement, the detail and particularity which the court below required of the trustees in reality subjects them to the same kind of "probable cause" standard that this Court has rejected in analogous situations—rejected because the requirement would compel litigation on the very subject of the inquiry. *See, United States v. Powell*, 379 U.S. 48, 54 (1964) (upholding the scope of an Internal Revenue Service investigation); *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (recognizing the broad scope of inquiry by the Federal Trade Commission); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 216 (1946) (enforcing the subpoena power under the Fair Labor Standards Act).

The court below imposed this "reasonable cause" standard on the trustees, because the court erroneously concluded that the scope of investigations by the Secretary of Labor into suspected or known violations of ERISA is expressly subject to such a standard. *See*, 29 U.S.C. § 1134(a). To the contrary, the Secretary is empowered

> . . . to make an investigation, and in connection therewith to require the submission of reports, books and records, and the filing of data in support of any information required to be filed with the Secretary under this title . . .

29 U.S.C. § 1134(a)(1), without any express requirement of reasonable cause.[4] Moreover, the Secretary may make an on-site review of such records, also without any

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[4] Recently the Sixth Circuit broadly interpreted the scope of information subject to this statutory provision. *See, United States v. S & Vee Cartage Co., Inc.*, 704 F.2d 914 (6th Cir.), *cert. denied*, 104 S.Ct. 343 (1983).

express requirement of reasonable cause, if that entry is made pursuant to an agreement. 29 U.S.C. § 1134(a)(2). The Secretary must satisfy an express reasonable cause standard only if on-site review is requested by the Secretary, but not agreed to by the subject of the review. 29 U.S.C. § 1134(a)(2). In the instant case there is no doubt that the employer agreed to an on-site audit by the trustees. Therefore, if the lower court's analogy to the role of the Secretary is properly drawn, the trustees do not need reasonable cause, because they have an agreement to conduct an on-site audit. Reasonable cause defines the limits of the entry into the workplace, not the scope of the audit.[5]

5. ERISA imposes on fund trustees the obligation to comply with detailed minimum standards governing participation, funding, vesting, reporting, and disclosure. Concomitantly, the statute establishes stringent penalties for failing to satisfy those obligations. The decision below, by intruding upon the day-to-day administration of trusts and limiting the independent authority of those involved in that administration, exposes trustees to the imposition of substantial civil and criminal penalties for failure to discharge their duties. *See*, 18 U.S.C. § 1027; 29 U.S.C. § 1132. Chief among those duties is that of unwavering and absolute loyalty to fund participants, *NLRB v. Amax Coal Co.*, *supra*. Yet the court below has denied the trustees the independent means to verify to whom that loyalty is owed.

This Court long ago held and ERISA now states that to assure the trustee's exercise of prudence in the collection and management of trust assets, beneficiaries must be given a complete accounting by the trustee. *Dillman*

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[5] Even if the statute were not absolutely clear, the lower court's reading of the provision is inconsistent with this Court's interpretation of similar investigatory provisions. *Accord, Marshall v. Barlow's, Inc.*, 429 U.S. 1347 (1977).

v. Hastings, 144 U.S. 136 (1892); 29 U.S.C. §§ 1024, 1025. Additionally, trustees must annually provide the federal government with highly detailed financial information concerning the assets and liabilities of the trust and the number of participants. 29 U.S.C. §§ 1024, 1307. Clearly, no accurate reporting and disclosure can be made if trustees cannot independently identify the beneficiaries—the necessary predicate to determining the trust's liability for accrued pension benefits—and the trust assets, which include appropriate employer contributions.

6. The court below simply misunderstood the purpose of a systematic audit: to inquire whether the employer's reporting is accurate, not to accuse the employer of inaccuracies. "It would seem elementary that no meaningful investigation . . . could be conducted if the identity of the persons involved must first be ascertained," *United States v. Bisceglia*, *supra*, 420 U.S. at 150, but the court below so held.

For years, trustees have relied upon audits as the most expeditious and reasonable means to verify the accuracy of their trust accounts. The legislative history of ERISA indicates that Congress refrained from delineating an exclusive and discrete list of powers and duties of fiduciaries. Hence, Congress did not dictate to trustees the type of mechanism necessary to assure accurate accounting of employer contributions. Rather, Congress intended that fiduciary conduct be governed by principles applicable to the common law of trusts, *see*, 3 United States Code Congressional and Administrative News, 1974, at 4639, 5186, thereby sanctioning trustees' use of audits—a traditional means of protecting and preserving trust assets.[6] Moreover, Congress, desirous of the continued

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[6] Thus, the Pension Benefit Guaranty Corporation (the "PBGC") —the only federal agency that is empowered to become trustee of

maintenance and financial integrity of multiemployer plans, recently enacted legislation to protect those plans and place further duties upon trustees to collect employer contributions. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (1980). This Court has recognized and adhered to that Congressional intent. *See, Jim McNeff, Inc. v. Todd, supra*; *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982); *NLRB v. Amax Coal Co., supra.* The holding below not only runs afoul of that Congressional purpose, but it also subverts the reasoning of this Court.

The Congress went to great lengths to make clear its reasons for recently amending ERISA:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. . . . This should not be the case. . . . Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
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> * * * *
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provisions be made to discourage delinquencies and simplify delinquency collection.

126 Cong. Rec. H7899 (daily ed. August 26, 1980). *See, Amax Coal Co., supra*, 453 U.S. 338, n.22.

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employee benefit funds, 29 U.S.C. § 1342(b)—performs an audit of a plan upon its assumption of plan trusteeship and seeks to collect any contributions that are owed to the plan. The PBGC describes in detail the steps to be taken in performing an audit of plan participant data. The first step is to "[s]ecure the names of all employees . . ." *PBGC OPO Operations Manual*, Chapter 9, § 2951.2. The second step is to "[c]ompare the list of employees . . . with the list of participants . . . [and d]etermine if eligibility provisions have been adhered to." *Id.*

The necessary predicate to any such delinquency action must be an audit. In fact, as discussed above, it is all but impossible for trustees to satisfy their obligations under the statute with respect to collection of contributions, if the trustees are not given a free hand to determine whether employers are making proper contributions. The decision by the lower court has left the trustees' collection role to the whimsy of employers. Essentially, the greater the employers' failure to report covered employees, the more restricted is the trustees' ability to monitor those failures.

B. The statutory mandate that trustees remain neutral and act for the exclusive benefit of trust beneficiaries would be materially compromised if trustees were required to delegate the determination of employee eligibility to adversely interested parties over whom the trustees have no control.

1. As discussed above, the underpinning of all fiduciary duties is the loyalty trustees owe to trust beneficiaries. The trustees' ultimate concern is the relationship between the beneficiaries and the fund. *NLRB v. Amax Coal Co.*, *supra*, 453 U.S. at 337-38. Thus trustees and their benefit funds are to be independent of employer and union control. *Schneider Moving & Storage Co. v. Robbins*, 104 S.Ct. 1844 (1984); *NLRB v. Amax Coal Co.*, *supra*. Moreover, ERISA was designed to reinforce, not to reduce, that independence by generally prohibiting the delegation of trustee responsibilities. *See*, 29 U.S.C. §§ 1105, 1110.

2. The holding below—which essentially delegates the trustees' duty to verify the identity of plan participants to the employer, the union, the employees themselves, or the Department of Labor—is inconsistent with decisions in the Sixth and other federal circuits, clearly erroneous under ERISA, and patently absurd. The dilemma forced

upon trustees by the inconsistency of the holding below is illustrated by comparing that decision to three other recent decisions. In *Rosen v. Hotel and Restaurant Emp., Etc., supra*, the court held that the trustees had an affirmative duty to notify a participant if contributions were not being made on his/her behalf; a duty to take action against the employer for failure or refusal to contribute; and an obligation to pay benefits to an eligible employee, even if his/her employer fails to make the appropriate contributions. The court recognized that although the union owes a duty of fair representation to its members, "it does not control, nor is it in a position to oversee, the employer's contributions to the Fund. *United States v. Santiago*, 528 F.2d 1130, 1133 (2d Cir. 1976), *cert. denied*, 425 U.S. 972 (1976)." *Rosen v. Hotel and Restaurant Emp., Etc.*, 637 F.2d at 599, n.10. *See, Robbins v. Prosser's Moving & Storage Co.*, 104 S.Ct. 1844 (1984). The *Rosen* decision stands in stark contrast to the delegation of trustee authority mandated in the decision below.

Consistent with the decision in *Rosen*, the Sixth Circuit held last year in *Van Gunten v. Central States, supra*, that trustees could not deny pension benefits to an employee on the grounds that the participant's employer had failed to make contributions. However, in addition to the obligation to pay benefits for which an employee labored, Congress imposed upon trustees a fiduciary duty to maintain the financial integrity of employee benefit trusts. Yet, the decision below, when read in conjunction with the *Rosen* and *Van Gunten* decisions, gives the trustees no independent mechanism to monitor the payment of monies into the trust, while at the same time requiring them to make payments out of the trust.

Moreover, in *Nichols v. Trustees of Asbestos Workers Pension Plan, supra*, the court held that it is clearly the nondelegable duty of trustees to determine what is owed

the plan. The court relied on, *inter alia*, the Third Circuit's decision in *Rosen*:

> [I]t is the duty of the Trustees to determine what is owed to the Plan in . . . contributions for the years in question, to attempt to collect this sum, and to create a system by which future . . . contributions may be monitored, recorded and credited with accuracy. Anything less would not be what 'a prudent man acting in a like capacity and familiar with such matters' would do. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). How the Trustees fulfill this duty is left to the discretion of the Trustees themselves; the Court, in its limited role in the administration of pension trusts, may only order them to do so. *See, e.g., Johnson v. Botica*, 537 F.2d 930, 937-38 (7th Cir. 1976); *Pete v. United Mine Workers*, 517 F.2d 1275, 1286 (D.C. Cir. 1975).

Nichols v. Trustees of Asbestos Workers Pension Plan, supra, 3 EBC at 1732.

If the ruling of the court below is permitted to stand, trustees administering plans that span the federal circuits will have no choice but to risk breaching a fiduciary duty in one jurisdiction due to a diminution of their authority in another.[7] Moreover, to the extent that the applicable federal agencies determine that the failure to collect employer contributions has jeopardized the financial integrity of a fund, trustees can be certain that these agencies will take action against them, *see*, 29

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[7] Multiemployer plans, like the one in the instant case, often extend coverage over wide geographical areas. Multiemployer plan participants do not choose their employer on the basis of the federal judicial circuit in which that employer does business. The duties and obligations of the trustees of these plans must, therefore, be uniform throughout the circuits. This need for consistency is also reflected in the express Congressional directive that the United States courts fashion a federal common law of pensions to fill the statutory interstices extant in ERISA. *See, e.g., Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 663 (9th Cir. 1981).

U.S.C. § 1134, notwithstanding the fact that the court below has severely limited the trustees' ability to audit an employer effectively and thereby discover delinquent contributions.

3. Although the lower court held that trustees could rely on the Department of Labor to ascertain the identity of participants, reality belies such reliance. The Department of Labor Pension and Welfare Benefit Program Compliance Manual lists and describes thirteen types of investigatory programs to be undertaken under ERISA. *Compliance Manual*, Chapter 9, §§ 204.012-204.0213. None of these programs deal with delinquent contributions or audits of employers to discover underreporting or nonreporting of covered employees.

This silence is telling and consistent with the express Congressional decision to deny the Department of Labor the right to initiate an action for delinquent contributions. 29 U.S.C. § 1132(b)(2). Moreover, at the same time that it denied this right to the Department of Labor, the Congress recognized that "[f]ederal pension law must permit trustees of plans to recover delinquent contributions efficaciously." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Summary and Analysis of Consideration of S. 1076, Multiemployer Pension Plan Amendments Act of 1980 (Comm. Print 1980) (unnumbered document) at 44. To accomplish this goal, Congress amended ERISA to provide that when trustees successfully sue to collect unpaid employer contributions, courts must award to the plans not only the contributions, but also interest on the contributions, liquidated damages, costs of the action, and reasonable attorney fees. 29 U.S.C. § 1132(g)(2).

4. The court below also held that trustees could delegate to the employees themselves the duty of determining whether they are plan participants. Such delegation turns all trust law on its head by imposing the duty of

the trustee on the beneficiary. Regarding the participants' ability to recognize and assert their own rights under plans, suffice it to say that ERISA's disclosure requirements are a direct response to testimony by one worker after another that he/she had been unaware of the provisions and rules of the applicable employee benefit plan. *See*, 120 Cong. Rec. 29934 (1974) (remarks by Sen. Williams).

The trustees, employer, and union are not only three distinct entities, but each has its own separate and often adverse interests in the determination of who is a covered employee. The interest of the union and the employer arise from their obligations to see that the collective bargaining agreement, to which they are parties, is administered in accordance with its terms and relevant statutory provisions. The employer also has obligations to keep accurate records and make the proper contributions, duties it owes to the union, the federal government, and the plan. Nonetheless, there is a recognized constant tension between these employer obligations and the reality of the employer's business realtionship with the plan. That relationship is adversarial, for the plan is a creditor of the employer; the employer's business interest is to minimize the claims of all creditors, including the plan's claim for contributions.

The trustees have a broader interest and more comprehensive obligations than either the employer or the union. The trustees clearly have a duty to determine in the first instance who is eligible to receive benefits. This inquiry cannot be left to that point in time when an individual applies for benefits. To the contrary, the trustees have an ongoing interest in knowing exactly who are the plan participants, *i.e.*, identifying the potential beneficiaries of their trust. Absent a vehicle for determining who the trust participants are, the trustees have no way to ascertain for whom contributions must be made. These con-

tributions, both once they are paid and while they are yet accounts receivable of the trust, are part of the trust *res*. *See*, 29 U.S.C. §§ 1082(b)(2), 1145.

Precluding the trustees from making a threshold analysis to identify the plan participants by means of an audit denies the trustees access to the basic information essential to fulfilling their common law and statutory fiduciary duties. Moreover, because the trustees have an overriding duty of loyalty to trust beneficiaries, the breach of which is subject to statutory sanctions, the trustees must be in a position to determine to whom they owe their allegiance.

Thus, the responsibility for the proper administration of the trust that the trustees owe to the federal government and all plan participants is more comprehensive than any duties owed by either the union or the employer. The court below has severely undermined the powers of the trustees to satisfy their independent responsibilities and has engendered a serious uncertainty as to how those responsibilities can be met.

V. CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to reverse the decision of the Court of Appeals in this case.

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NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DELOITTE HASKINS & SELLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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v.

CENTRAL TRANSPORT, INC., et al.,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DELOITTE HASKINS & SELLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

Deloitte Haskins & Sells ("Deloitte") submits this brief as *amicus curiae* with the consent of Petitioners and Respondents[1] and urges this Court that the decision of the United States Court of Appeals for the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 698 F.2d 802 (6th Cir.

[1] Letters manifesting the consent of the parties have been filed with the Clerk of the Court.

1983), should not be reversed on the mistaken ground that the integrity of multiemployer benefit plan audits is at stake. It is not. The arguments to that effect made by *amicus curiae* Arthur Young & Company ("Arthur Young") and relied upon by Petitioners' and the other *amici* supporting Petitioners are based on an overbroad reading of the Court of Appeals' decision and a misleadingly limited view of the alternative auditing procedures available to verify Respondents' participation data in this case. It is not true, as Arthur Young and the Petitioners contend, that the ruling of the Sixth Circuit "will materially impair the ability of independent certified public accountants . . . to conduct audits of multiemployer benefit plans in accordance with" Generally Accepted Auditing Standards ("GAAS"),[2] as required by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.§1023(a)(3)(A).

No one questions the importance of insuring that the trustees of multiemployer benefit plans such as Petitioners have available to them auditing procedures sufficient for the discharge of their fiduciary duties and, specifically, sufficient so that an independent auditor can form an opinion as to whether the annual financial statements and required schedules are presented fairly in conformity with Generally Accepted Accounting Principles ("GAAP"), 29 U.S.C. §1023(a)(3)(A). Further, Deloitte does not question the general proposition that directly "sampling the entire employee universe" of employers like Respondents, as an auditing procedure to check the reliability of reported participation figures, is consistent with GAAS. The error of the Arthur Young position is its strong and unfounded implication that no other satisfactory auditing procedures exist, also consistent with GAAS, which are practical and not foreclosed by the decision of the Sixth Circuit.

Neither this record nor any authoritative source known to Deloitte suggests that multiemployer benefit plans actually are receiving limited or qualified opinion letters because

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[2] Arthur Young Am. Br. at 2-3.

of their independent auditors' concerns over the reliability of participation statistics. Indeed, Arthur Young did not qualify its opinion in this respect on the 1981 and 1982 financial statements of the plan, even though Petitioners' internal auditors had not directly "tested the universe" of Respondents' employees as Arthur Young delicately argues to this Court "may" be necessary.[3] Obviously, Arthur Young has been able to satisfy itself, by means of other auditing procedures or a reasoned judgment of immateriality, that significant errors do not exist in the documents listing Respondents' participating employees.

INTEREST OF *AMICUS CURIAE*

Deloitte Haskins & Sells is an accounting firm of certified public accountants which has over 100 offices and 8,500 professionals in the United States. Deloitte is, *inter alia*, the independent auditor of Respondents, Central Transport, Inc., other similar companies, public and private, and several thousand employee benefit plans (including multiemployer benefit plans like Petitioners).

Deloitte has followed this case with interest from the District Court for the Eastern District of Michigan to this Court, both as Respondents' independent auditors and as an active member of the American Institute of Certified Public Accountants ("AICPA") and the AICPA Employee Benefit Plans and ERISA Special Committee,[4] whose AUDITS OF EMPLOYEE BENEFIT PLANS (1983) ("1983 INDUSTRY AUDIT GUIDE") was circulating as an exposure draft when this case arose.

Deloitte is concerned that this Court, because of the *amicus curiae* brief of Arthur Young, may erroneously

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[3] *See* Respondents' App. "D" at p. 32a.

[4] James B. Miller, a partner with Deloitte Haskins & Sells, was a member of the Employee Benefit Plans and ERISA Special Committee which prepared the 1983 INDUSTRY AUDIT GUIDE.

conclude that an auditing procedure, which is no more than one means of achieving the ultimate auditing objective, is in fact the only procedure sanctioned by GAAS. Arthur Young has presented this Court with a misleadingly limited view of GAAS and the 1983 INDUSTRY AUDIT GUIDE. Deloitte wishes to present a broader and more balanced view of the relevant auditing considerations, considerations which in fact are not compromised by the Sixth Circuit's ruling.

SUMMARY OF ARGUMENT

Despite the protestations of Petitioners and Arthur Young, the ability of a multiemployer benefit plan's internal and independent auditors to conduct meaningful audits has not been gutted by the United States Court of Appeals for the Sixth Circuit. The decision in this case has no impact whatever on the auditing of known participant records. It in no manner limits audits conducted to identify unreported participants where there is reasonable cause to believe they exist.

The specific auditing procedure addressed by the lower courts is but one method of obtaining evidential matter to support an opinion on participant data. Petitioners seek to verify the material accuracy of reported participant totals by reviewing the records of employees thought by Respondents and the Union not to qualify for participation. The Sixth Circuit ruled that this audit procedure could not randomly[5] be applied to the records of these employers, who had not contractually bound themselves to submit to it.

Other auditing procedures to achieve the same audit objective, *i.e.*, verification of the reliability of participant

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[5] Petitioners define a "random" audit as "one in which an employer is selected without any reason to believe it is not reporting correctly." Petitioners' Brief on the Merits at 12 n.12. Other criteria do apparently enter into the selection decision. One would expect considerations of materiality and typicality, at least, to influence such sampling decisions. *See* NCCMP Am. Br. (July 26, 1983) at 4 n. 1.

data, remain untouched by the decision of the Sixth Circuit. The chief failing of the Arthur Young *amicus* brief is its total silence with respect to those other generally accepted procedures. The specific fact situation presented by this case is one in which perfectly adequate — indeed, more cost effective — audit procedures have been available all along.

For example, Arthur Young did not inform this Court that generally accepted auditing standards permitted it to request that Deloitte perform auditing procedures designed to test the accuracy of Respondents' participation data and issue a "special report" stating the conclusions resulting from such procedures. 1983 INDUSTRY AUDIT GUIDE, §10.6(c); AICPA Professional Standards (CCH) §543 (1972).

Another alternative open to Petitioners and their independent auditor is the testing of Respondents' data by direct comparison to Union dues check-off lists. A high correlation between these independently generated records would significantly reduce the likelihood that material errors exist. AICPA Professional Standards (CCH) §326.18(a) (1980). A low likelihood of material errors makes extensive (and expensive) direct sampling a less preferable audit alternative. There is no auditing jusitification for collecting more than "sufficient" evidence, *id.* §326.19-.21, particularly when the client has a fiduciary obligation to control its administrative expenses.

If further testing is thought desirable after comparison of records from an independent source, another acceptable auditing procedure is direct communication with selected employees. 1983 INDUSTRY AUDIT GUIDE, §10.6(a). "The independent auditor's direct personal knowledge, obtained through physical examination, observation, computation, and inspection, is more persuasive than information obtained indirectly." AICPA Professional Standards (CCH) §326.18(c) (1980). Moreover, because the pertinent factual inquiry would be whether nonunion employees were per-

forming bargaining unit work, direct contact with employees should be more illuminating than mere perusal of employer financial and personnel records in fact settings like the case at bar.

In short, there is no justification whatever for Arthur Young's unqualified assertion that the decision of the Sixth Circuit "will materially impair the ability of independent certified public accountants . . . to conduct audits of multiemployer benefit plans in accordance with GAAS." Arthur Young Am Br. at 2-3.

ARGUMENT

I.

THE LIMITED SCOPE OF THE SIXTH CIRCUIT'S DECISION FROM AN AUDITOR'S VIEWPOINT

Quite apart from their contractual argument, Petitioners ask this Court to "give specific content to the 'prudent man' rule of ERISA," Petitioners' Brief on the Merits at 5, by which they essentially mean that this Court should give them the same broad power to audit employer records that the Internal Revenue Service has with respect to taxpayer records. Petitioners attempt to marshal various arguments in support of the sweeping authority they seek, including the claim that the Sixth Circuit's ruling deprives them of an auditing procedure to which they must have absolutely unfettered access if they are independently to verify the completeness of employer representations and, in the process, satisfy their outside auditors that their internal auditing procedures comply with GAAS. *Id.* at 41. However, the facts in this case (*i.e.*, large employers with their own reliable internal accounting controls and outside auditors; an active and independent union; and no evidence of material error) simply do not support this claimed necessity for the specific audit power sought by Petitioners. It is easier to understand why the integrity of the auditing process is not

threatened by the Sixth Circuit's decision if a few general points are kept firmly in mind.

A. Only material errors bear on auditing conclusions.

"Materiality" is a crucial concept for accountants, but not subject to authoritative definition because its meaning is always context-specific. The possibility of a million dollar error is material to a small private company but generally would be immaterial to an entity with assets exceeding 4 billion dollars. In terms of people rather than dollars, it is not material to an auditor that a multiemployer benefit plan apparently covering 500,000 individuals may actually cover 499,996, or that an employer contributing for hundreds of eligible employees may have erred as to four.

Deloitte does not know how Petitioners' auditors satisfied themselves with respect to the reliability of Respondents' records in 1981 and 1982. However, one very real possibility is that they made a judgment that any error in reported participation data would surely be an immaterially small percentage of Respondents' known participants.

The element of materiality underlies the application of all generally accepted auditing standards, particularly the standards of field work and reporting. AICPA Professional Standards (CCH) §150.03 (1972). Although a difficult concept to define, the impact of materiality on the auditor's reasoning processes is readily describable:

> The concept of materiality is inherent in the work of the independent auditor. There should be stronger grounds to sustain the independent auditor's opinion with respect to those items which are relatively more important and with respect to those in which the possibilities of material error are greater than with respect to those of lesser importance or those in which the possibility of material error is remote. *Id.* §150.04.

Evaluating materiality is more than a mechanical comparison of the dollar value of a particular item under examination to a certain component of the financial statements (*i.e.*, total assets, equity, revenues, net income, etc.):

> [T]he concept involves qualitative as well as quantitative judgments. The significance of an item to a particular entity . . ., the pervasiveness of the misstatement . . ., and the impact of the misstatement on the financial statements taken as a whole are all factors to be considered in making a judgment regarding materiality. *Id.* §509.16 (1974).

Although the court of appeals did not overtly apply a materiality analysis to the auditing question before it, many parallels exist with the "reasonable cause" analysis the court did use. In this case, either route led to the conclusion that "concern over the status of four employees [does not] justify an investigation into the records of all Transport's employees." 698 F.2d at 813. The court had found that ERISA did not afford Petitioners a statutory right to audit nonparticipant records and was considering whether Article IV of the governing trust agreements gave them the right. The court found a "limited right" to audit nonparticipant records in this case, responsive to Petitioners' actual needs and mindful of the apparent immateriality of the potential error in Respondents' records. There is no reason why this decision should prevent courts faced with material and pervasive errors in employer records from finding that trust provisions like Article IV justify broader audit powers than were needed here (*see* discussion at 10-11, *infra*).

B. No issue is raised with respect to the records of employees reported as plan participants.

The vast majority of eligible participants are identified individuals. Underfunding has a great deal more to do with the failure of employers to contribute enough or at all for

identified participants than it does with the failure to contribute for unidentified but eligible employees. It is therefore worth emphasizing that the court of appeals in no way restricted the auditing of identified participant records. As the court said, the Petitioners:

> may also examine records relating to admittedly covered employees which are necessary to determine when their coverage began and ended or the proper amount of contributions. They may also be entitled to other records such as drivers' logs which relate only to covered employees. It would appear that all truck drivers employed by Transport are covered by the collective bargaining agreements. 698 F.2d at 812.

Petitioners claim that their auditors had identified underreporting errors for Respondents' covered employees aggregating $268,362.50 (Petitioners' Brief on the Merits at 8). However, aside from the immateriality of this amount in light of the many millions of dollars contributed by Respondents to Petitioners annually, all the allegedly erroneous practices which led to the errors claimed were brought to light by reviewing the records of covered employees (*see id.* at 8 n.8). The only evidence in this record bearing on the need to review other employee information is the fact that Respondents had made contributions on behalf of four possibly ineligible individuals among the hundreds of properly participating employees. These are the facts an auditor must have in mind when determining what further audit procedures, if any, are called for in the circumstances presented.

C. The Sixth Circuit held only that one particular auditing procedure could not be used by plan trustees with respect to employers who had not contractually bound themselves to submit to it, in the absence of reasonable cause to believe the employer's records were materially in error.

Petitioners and their *amici* write as though the Sixth Circuit had announced as a universally applicable matter of law that multiemployer plan trustees must accept

unquestioningly whatever participant identification data employers submit (subject only to a uselessly limited audit power). No doubt Petitioners portray the opinion of the court of appeals broadly to make it a bigger and more vulnerable target in this Court. It is instructive, however, to consider how Petitioners and their *amici* could be expected to characterize the opinion in future litigation brought to resolve factually distinguishable auditing disputes between plans and employers. In this context, plan trustees no doubt will stress that the court of appeals tailored its decision in light of the particular parties and contracts before it to insure that Central States would have such access to Central Transport's records as it had demonstrated a need for. Different facts may make different auditing procedures reasonably necessary, and call for a different judicial response in cases where trustees must resort to the courts.

A good example of a substantially different fact situation is *Hughes* v. *Baker Cement Contractors, Inc.*, No. 81-3307 (6th Cir. July 6, 1982) (unreported), a case set forth in the appendix to the *amicus curiae* brief of the Bricklayers Fringe Benefit Funds, et al. That case, like this one, reached the Sixth Circuit after a summary judgment for a defendant employer. The district court held that the employer did not have to disclose records pertaining to employees it had classified as nonparticipating, because the plaintiff trustees could complete their audit by resorting to union records. However, in *Hughes* the facts were very different. The collective bargaining agreement did not require laborers employed by Baker before June 1, 1975 to join the union. Moreover, Baker had no collective bargaining agreement in three geographic areas covered by the plans and therefore could use non-union labor in those areas. Accordingly, as the court of appeals noted,

> there were at least two groups of employees of indefinite size for whom the employer was required to make trust fund contributions but whose eligibility for same could not be determined from Union records. (Bricklayers App. 5a).

In the case at bar, all employees who perform bargaining unit work are required to be union members. A two-month long audit had revealed only that four employees for whom Respondents made contributions were not union members. The court of appeals' opinion discussed possible erroneous employer reporting in terms of particular, identifiable employees because the facts before the court suggested no more. A very different situation exists where possible errors affecting entire "groups of employees of indefinite size" cannot be cross-checked against union records. In *Hughes* the court of appeals reversed because the district court plainly erred in deeming the union records to be a dependable, independent source of verification in the auditing sense. The union records, although independent, were not reliably complete.

The *Hughes* panel noted that *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981) "appears to be distinguishable from the case at bar on its facts" (Bricklayers App. 6a). That is true, because the facts in *CRST*, just as in the case before this Court, strongly indicate that the union records *were* reliable. *Id.* at 619.[6] There is no warrant in the court of appeals' ruling now before this Court for the conclusion that it would deny access to necessary auditing records in a *Hughes*-type setting merely because plan trustees couldn't identify the possibly omitted employees by name.

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[6] The *Hughes* panel rejected the suggestion "that the union steward is the ultimate safeguard as to who is doing laborers' work" (Bricklayers App. 5a). An auditor makes no such extreme assumption in deciding whether particular union records will be useful. *See* discussion *infra* at 16-17.

II.
THE INDEPENDENT AUDITOR OF A PLAN MUST BE ABLE TO OBTAIN "SUFFICIENT COMPETENT EVIDENTIAL MATTER . . . THROUGH INSPECTION, INQUIRIES, AND CONFIRMATIONS TO AFFORD A REASONABLE BASIS FOR AN OPINION REGARDING THE FINANCIAL STATEMENTS UNDER EXAMINATION."

The quotation in the above heading is known to auditors as the third standard of field work, one of the generally accepted auditing standards. *See* AICPA Professional Standards (CCH) §§150.02 (1972) and 326.01 (1980). "Most of the independent auditor's work in forming his opinion on financial statements, consists of obtaining and evaluating evidential matter concerning the assertions in such financial statements." *Id.* §326.02. The financial statements of multiemployer plans are premised in part upon assertions regarding the number of participants, a number calculated in the first instance by totalling the numbers reported by employers. The auditor[7] wants to accumulate sufficient "audit evidence" (defined more broadly than legal evidence) to support the numbers reported, but is not interested in gathering additional evidence after he is persuaded that any possible errors would be immaterial to the overall fair presentation of the plan's financial statements (or an employer's records). The third standard of field work describes both parameters: Evidence must be "sufficient", but it becomes sufficient as soon as it provides a "reasonable basis for an opinion."

> The independent auditor's objective is to obtain sufficient competent evidential matter to provide him with a reasonable basis for forming an opinion. The amount

[7] This discussion holds true for either internal or independent auditors. One difference between the two is that the independent auditor, before deciding what tests he should make, first considers to what extent he can rely on the internal auditing work. *See* AICPA Professional Standards (CCH) §326.11 (1980).

> and kinds of evidential matter required to support an informed opinion are matters for the auditor to determine in the exercise of his professional judgment after a careful study of the circumstances in the particular case. In the great majority of cases, the auditor finds it necessary to rely on evidence that is persuasive rather than convincing. *Id.* §326.19.

In evaluating a plan's participation data, the data supplied by employers is evidential matter. Union records are also evidential matter, but provide "greater assurance of reliability" than employer data because they are from an independent source. *Id.* 326.18(a).

The specific auditing question raised by the case at bar is whether sufficient evidential matter was available to Petitioners' internal auditors to give them a reasonable basis for forming an opinion concerning the reliability of Respondents' participation data. That question is addressed in subsequent sections of this brief and answered affirmatively. The broader question Arthur Young seeks to raise in this Court is whether an independent auditor can form a similar opinion of reliability concerning a plan's overall participation data if, as to certain contributing employers, certain evidential matter cannot be obtained. The answer to this question is also yes, so long as sufficient evidential matter can be obtained by other means.

Because Petitioners actually audit only selected employers to verify reported participation data, they claim they must have unfettered discretion to obtain evidential matter by sampling the entire universe of an employer's participating and nonparticipating employees. However, the need for or desirability of a selective audit of employers does not lead to the conclusion that a particular audit procedure must invariably be applied to every employer selected. Once the plan's auditors select a particular employer for auditing, their concern should be with forming an opinion about that employer's data by whatever means are available and most practical. The procedures are the

same for individual employer audits as they are for the independent auditor's examination of overall plan data; only the scale is different. In each case the auditor must obtain sufficient evidence to support a reasoned judgment that there is no material error.

III.
IN FACT SITUATIONS LIKE THE CASE AT BAR, PLAN AUDITORS CAN SATISFY THEMSELVES AS TO THE ACCURACY OF REPORTED PARTICIPATION FIGURES BY OBTAINING A SPECIAL REPORT FROM THE EMPLOYER'S INDEPENDENT AUDITOR.

This Court has been asked to consider the impact of the Sixth Circuit's decision on very different auditing situations involving small, marginal and "transient" employers in other industries. As noted earlier, this *amicus* does not read the opinion of the court of appeals as an attempt to broadly prescribe the limits of auditing authority available to multiemployer plans, regardless of the situation (see 10-11, *supra*). Rather, the court was reacting to a demand that it aid in the imposition on Respondents of a particular auditing procedure, the need for which *in this case* was not demonstrated. Respondents are not small, marginal or "transient" employers. They are large companies with substantial assets. They have separate benefit plans for employees not covered by collective bargaining agreements. Moreover, they have an independent auditor whose opinion Petitioners can solicit.

A. Section10.6(c) of the 1983 INDUSTRY AUDIT GUIDE.

The auditing problem presented by this case — and its solution — was foreseen and provided for in the 1983 INDUSTRY AUDIT GUIDE:

> 10.6 If the auditor is unable to examine the participant's records, *which may occur in a multiemployer plan*, there

> may be circumstances, depending on the existing control environment, in which the auditor can obtain the necessary assurance by applying one or more procedures, such as —
>
> . . .
>
> C. Obtaining a special report from the auditor of the employer company stating that appropriate auditing procedures (as described above) have been performed, and obtaining the auditor's conclusions regarding the procedures applied. In addition, the plan auditor should apply such other auditing procedures as he considers necessary in the circumstances. In this regard, it may be necessary for the plan auditor to request the other auditor to apply additional tests. (See SAS No. 1, Sec. 543) (emphasis added).

Neither Arthur Young nor the Petitioners' internal auditors have ever requested a special report from Respondents' independent auditor, or asked it to apply particular tests to Respondents' records. Presumably they felt it was unnecessary in the circumstances presented. However, the alternative was there to be used. Issuance of the 1983 INDUSTRY AUDIT GUIDE did not alter previously-existing procedures available to achieve the auditing objective of verifying the reliability of participant data.

Section 10.6(c) is no more than an application to multiemployer plans of more general principles concerning the use by one auditor of another independent auditor's work. Those principles, discussed next, were issued in 1972 and modified in 1981.

B. AICPA Professional Standards §543.

Section 543 provides guidance to "principal" auditors considering whether to use the work of "other independent auditors who have examined the financial statements of one or more subsidiaries, divisions, branches, components, or investments . . . ." AICPA Professional Standards (CCH) §543.01 (1972, as modified in 1981). The relationship between multiemployer plans and their contributing employers

is analogous to the relationships enumerated in §543, as §10.6(c) of the 1983 INDUSTRY AUDIT GUIDE makes explicit.

Section 543.10 describes the nature of the inquiry the principal auditor should make "concerning the professional reputation and independence of the other auditor." Inquiries concerning reputation and standing are unnecessary where these matters are already known to the principal auditor. The professional reputation and standing of the "Big Eight" accounting firms is well known to Arthur Young, itself one of that group.

Once a principal auditor decides to make use of another independent auditor's work, the principal auditor must decide whether to make reference in its opinion to the examination of the other auditor. Even where such reference is made, it is "not to be construed as a qualification of the opinion . . ." AICPA Professional Standards (CCH) §543.08. However, reference ordinarily is unnecessary if the other auditor's competence is known or the matter audited by the other is not material to the principal auditor's opinion. *Id.* §543.05 *Cf.* 1983 INDUSTRY AUDIT GUIDE, §12.21.

IV.
OTHER ALTERNATIVES AVAILABLE TO PLAN AUDITORS TO VERIFY THE ACCURACY OF REPORTED PARTICIPATION FIGURES: 1983 INDUSTRY AUDIT GUIDE, §10.6(a).

A. Union records.

Other briefs before this Court make the point that the Union and Petitioners are distinct entities whose interests may not always be precisely congruent, citing *inter alia* this Court's recent decision in *Schneider Moving & Storage Co.* v. *Robbins*, ___ U.S. ___, 104 S. Ct. 1844, 80 L.Ed.2d 366 (1984) (plan trustees have direct access to the courts without resort to an arbitration remedy they cannot compel the union to institute on their behalf). From the auditor's

viewpoint, the question is not whether unions and benefit plans have identical interests, but whether union records (dues check-off lists) are reliable, independent records which will be useful in verifying the accuracy of employer-generated lists of covered employees. In assessing the reliability of union records, the auditor will consider the union's natural motives to enroll and collect dues from every new employee who performs bargaining unit work. The auditor also will consider the nature of the industry involved and the provisions of the governing collective bargaining agreements to determine whether substantially all eligible employees will be union members. Although these considerations do not lead to the conclusion that unions records are infallible, in cases like the one now before this Court they do support an inference of reliability. Comparison with union records is one of the tests specifically suggested in the 1983 INDUSTRY AUDIT GUIDE, §10.6(a).

Accordingly, if an employer's records are substantially congruent with the union's, the plan's auditor has reason to believe that any errors of omission probably will be immaterial. In cases where there is reason to believe that union records may be significantly incomplete, the plan's auditor may wish to observe, question or correspond with a sampling of employees directly.

B. Direct communication with participants.

The eligibility of Respondents' employees to participate in the Central States plans is a function of the work they do, not their rate of pay or other financial data concerning them in Respondents' records. The "phantom" participants Petitioners seek to discover would, if they existed, be nonunion employees engaged in bargaining unit work. Although the audit procedure of sampling random employee records chosen from the total employee population might locate unidentified but eligible individuals, sampling the employees themselves by directly communicating with them is a more focused audit procedure suggested by the 1983 INDUSTRY AUDIT GUIDE, §10.6(a). Neither procedure,

in the case at bar, has much to recommend it in comparison to the alternatives discussed earlier, *i.e.*, a special report from an employer's auditor and verification through union records. However, there may be other fact situations in which some form of direct communication would prove useful.

It is possible to hypothesize a fact setting in which entire categories of eligible employees are not required to be union members, the employer has no independent auditor and the employee population is so widely scattered, transient and otherwise difficult to identify that a reasonably prudent plan auditor might conclude that the only feasible procedure in the circumstances presented would be to test employee records drawn from the entire universe of that employer's employees. If the plan's governing trust agreement contained a clause like Article IV in the case at bar, a district court might well agree with the plan trustees that they had the right to conduct that reasonably necessary auditing procedure. This result would do no violence at all to any principle set forth in the court of appeals' opinion in the case at bar.

From an auditor's viewpoint, the mere possibility that such a fact setting might arise does not compel the conclusion that any one audit procedure must be available for use in every case, including the majority of cases in which other procedures to accomplish the audit objective are available, practical and cost effective.

CONCLUSION

For all the foregoing reasons, Deloitte Haskins & Sells respectfully submits that this Court should not disturb the decision of the Sixth Circuit out of concern for its effect on audits of and by multiemployer plans.

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